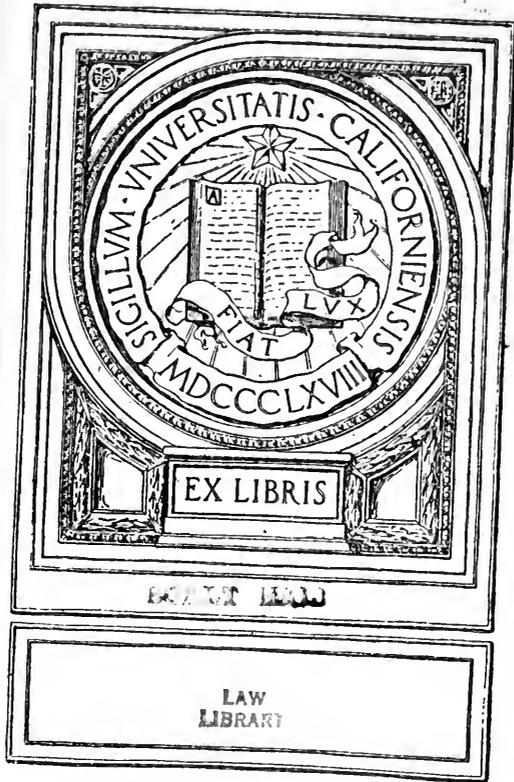


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THE
CLASSICS OF INTERNATIONAL LAW

EDITED BY

JAMES BROWN SCOTT

*Member of the Institute of International Law
Secretary of the Carnegie Endowment for International Peace*

UNIV. OF
CALIFORNIA

De Jure et Officiis Bellicis et Disciplina Militari Libri III

BY BALTHAZAR AYALA

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EDITED BY JOHN WESTLAKE, LL. D., D. C. L., K. C.

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- VOL. I. Reproduction of the First Edition, with Introduction by John Westlake.
- VOL. II. Translation of the Text, by John Pawley Bate, with Translator's Note and Index of Citations.

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PREFACE.

The Carnegie Institution of Washington has undertaken the republication of the leading classics of International Law and the present volume, edited by the distinguished publicist Professor John Westlake, is the second of a comprehensive series.

The grounds for including Ayala's treatise *De Jure et Officiis Bellicis et Disciplina Militari* are sufficiently set forth by Professor Westlake in his introduction. The original text is exceedingly difficult to procure and has not hitherto been translated into English. The photographic reproduction places the work within the hands of scholars of any and all countries, and the faithful and literary translation by Mr. John Pawley Bate makes its mastery an easy matter to the English-speaking world.

One reason for republishing the classics of International Law is the difficulty of procuring the texts in convenient form for scientific study; the libraries in the United States have been searched with the result that few of the earlier works were to be found. Another reason is that some of the works selected for republication have never been translated into English. The American publicist is therefore at a disadvantage in consulting works of admitted authority, and when found they are, as it were, sealed books to all but trained Latinists. The specialist is thus forced to rely upon summary statements and references to them to be found in treatises on International Law, or is driven to examine them in European Libraries, often a difficult task, while the general reader is practically barred from the stores of knowledge locked up in the earlier works on the Law of Nations. The same difficulty exists in Latin America, Japan, and in a lesser degree in many European countries.

Eminent publicists, European and American, who have been consulted as to the usefulness of the plan to republish the Classics, have indorsed the project and have pledged their personal co-operation. The works to be included in the series have not only

been approved but suggested by them, so that the undertaking is international in scope, in selection, and in execution.

The underlying principle of selection has been to reissue those works which can be said to have contributed either to the origin or to the growth of International Law and the term classic has been used in the broad rather than in the narrow sense, so that no work will be omitted which can be said to have contributed to the origin or growth of the Law of Nations. The masterpieces of Grotius will naturally be the central point in the series, but the works of his leading predecessors and successors will likewise be included. The text of each author will be reproduced photographically, so as to lay the source before the reader without the mistakes which might creep into a newly printed text. In the case of the early authors the photographed text will be accompanied by a revised text whenever that course shall seem desirable. An Introduction will be prefixed to each work, giving the necessary biographical details and stating the importance of the text and its place in International Law; tables of errata will be added, and notes deemed necessary to clear up doubts and ambiguities or to correct mistakes in the text will be supplied. Variations in successive editions of the text published in the author's lifetime will be noted, but little or nothing in the nature of historical commentary will be furnished.

Each work will be accompanied by an English version made expressly for the series by a competent translator.

It is hoped that the series will enable general readers as well as specialists to trace International Law from its faint and unconscious beginnings to its present ample proportions and to forecast with some degree of certainty its future development into that law which Mirabeau tells us will one day rule the world.

JAMES BROWN SCOTT,
General Editor.

Washington, D. C., September 1, 1912.

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BALTHASAR AYALA I.C. ET SENATOR
REGIVS MACHLINIENSIS.

*FeLIX IngenIo, rethor graVIs, arte dIserTVs
LIIngVIsqVe, et CLarVIs IVre perlTVs erat:
RegIVS In bello IVdEX, desCripSIt, et iLLa
BeLLICa, qVae aqValli, IVra hILanCe dabat:
prInCIPibVsqVe VIRIs graTVs, deCoratVIs honoro
offICIo, seros oCCIdIt ante dIes.*

BALTHAZARUS DE ALAE

I. C. et Exercitia Rerum quae ad Regem pertinent
De Jure et Officiis B. Regis et Praesidis Maritimi

LIBER III

AVTHOR

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Honorary Secretary of the Society of the Inner Temple

VOL. III





BALTHAZARIS AYALAE
I. C. et Exercitus Regii apud Belgas Supremi Juridici
De Jure et Officiis Bellicis et Disciplina Militari
Libri III

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VOLUME ONE



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TABLE OF CONTENTS.

VOLUME I.

	pages
1. Preface, by General Editor.....	3a-4a
2. Introduction, by John Westlake.....	i-xxvii
3. Epistola Dedicatoria, Praefatio de Jure Belli, Enumeratio Caputum, and de Jure et Officiis Bellicis et Disciplina Militari Libri III....	1-226
4. Note on Corrections of the Text and Errors in the Marginal References.....	227

The text here reproduced was photographed from a copy of the original edition of 1582, belonging to the library at All Souls College, Oxford, and loaned to the University Press for the purpose of photographing.

The portrait of Ayala given in this volume has been reproduced by photography from one found in a volume of portraits of Belgian authors, published at Antwerp in 1608, with the title *Illustrium Galliae Belgicae Scriptorum Icones et Elogia: ex Musaeo Auberti Mirae Canonici Antwerp.*

VOLUME II.

	pages
1. Translator's Note on Corrections of the Text, Errors in the Marginal References and Mode of Citation adopted in the Translation; and classified List of Authorities.....	7a-10a
2. Translation of Epistola Dedicatoria, Praefatio de Jure Belli, Enumeratio Caputum, and de Jure et Officiis Bellicis et Disciplina Militari Libri III.....	i-xii and 3-246
3. Index of Citations.....	247-250

INTRODUCTION.

I.

AYALA; AND BOOK I, CHAPTER 1.

In a celebrated passage of the *prolegomena* or preface to his great work, § 37, Grotius mentions a number of books which he had seen, some by theologians and some by doctors of law, treating specially on the *jus belli*, an expression not adequately translatable in any short English form. Besides the laws of war, that is, the rules according to which it ought to be carried on, it includes all that relates to the place of war in a philosophical system of human life and conduct. And these predecessors he condemns, all of them because they had said so little on a very wide subject, most of them also because they had mixed up in disorderly confusion things belonging to natural, divine, state or canon law, or to the received law of nations (*jus gentium*). He goes on in § 38 to name three others who had attempted to supply what was most lacking in the first mentioned, the light thrown by history; but of these he at once dismisses Faber as not having enunciated propositions to which his citations might apply, while the other two, Balthazar Ayala and Albericus Gentilis, had referred the examples cited by them to certain propositions laid down by them. Grotius then admits his indebtedness to the industry of Gentilis, though he leaves readers to form their own judgment on the doctrinal use to which Gentilis put his collections. Of Ayala he only says—and, as we shall see, incorrectly—that he did not touch the causes for which a war is called just or unjust. If these notices do not amount to praise, at least they show that Grotius agreed with general opinion in marking Ayala and Gentilis as his two chief predecessors in what is now called international law. And in any comparison of their merits Ayala claims our sympathy and

our excuse for his shortcomings, as being the first in time. He died in 1584, the year before the publication of Gentilis's first book, *de Legationibus libri tres*. How early they both were in relation to the development of thought on their subject will be seen from the fact that it was not till 1612, after the deaths of both, that Suarez, the greatest of Grotius's predecessors in the philosophy of law, published his *Tractatus de Legibus et de Deo Legislatore*.

Balthazar de Ayala was born a subject of the Emperor Charles the Fifth, at Antwerp in 1548. His father, Don Diego de Ayala, was a native of Burgos in Spain, and had obtained the rights of citizenship at Antwerp in 1531-1532. His mother was the daughter of Charles de Renialme, a licentiate in law and an Alderman (*échevin*) of the same city in 1531, 1532 and 1534. Thus Balthazar had ties with each of the principal parts of the vast dominions of Charles and his son Philip, but he was essentially a Netherlander (*Belge*). He had arrived at years of discretion when in the disturbances of 1566 the Netherlands began to be convulsed by the struggle for civil and religious liberty, and at years of manhood when in 1572 the insurrection was placed on a firm footing through the seizure of the port of Brill by the Sea-Beggars (*gueux de la mer*). But neither Balthazar nor any of his family appears at all to have doubted which side they should take. His brother Gregory was a member of the Council of Brabant. His brother Philip was Spanish ambassador at the court of Henry the Fourth of France, and afterwards held an important place in the financial administration of the Netherlands under the Archduke Albert. His first cousin, Gabriel de Ayala, doctor of medicine of the University of Louvain, became the public medical officer (*médecin pensionnaire*) of the city of Brussels, and published a volume of epigrams in Latin verse. A relation, the Canon de Ayala, was a correspondent of Cardinal Granvelle and was employed by the Netherland bishops as their agent at Rome. Balthazar himself became a licentiate of law in the University of Louvain, and we may conjecture that he spent some time there in the acquisition of the learning of which his book is full.

The Netherlands military service was distinct from the Spanish, as might be expected from the fact that Charles the Fifth and Philip the Second held the Netherlands—that is, the Burgundian inheritance completed by the acquisitions made by Charles on the defeat of the Schmalkaldic League—in a merely personal union with the crown of Spain. In 1553 Charles created for the military forces of the Netherlands two great officers, the auditor and the captain of justice. The character of the former office may be learnt from the commission of its first holder, Doctor Stratius, in which it is said that “in order that we may be the better able to keep our said army in good discipline and justice, we have found it necessary to commission some scholarly person (*personnage de lettres*), learned and experienced in the matter of justice, to be with our captain-general of our said army, and under him to execute the office of auditor of the camp and give him good advice and counsel in what shall concern justice”. The term captain-general was combined with that of lieutenant-governor to form the title of the king’s representative in the Netherlands, as in Ayala’s dedication of this book we find it applied to the Prince of Parma in its Latin form of *imperator*. Thus the auditor, as military judge and judicial adviser of the chief of the army, held a position similar to that of the English judge-advocate-general, and in one respect with more extensive attributes. For while the rule in the Netherlands was that soldiers were tried for common crimes, not depending on the quality of a soldier, by the jurisdictions to which they were subject in their civil capacity, an exception was made for foreign soldiers and their servants who, if they did not fall under the special jurisdiction existing for persons attached to the court, were tried for all crimes by the military judge. Under this system the employment of Spanish troops in the Netherlands must have made a considerable addition to the duties of the auditor.*

To this military auditorship Ayala was appointed at the age of thirty-two, doubtless in consequence at once of family interest and of the reputation earned by his studies. The following

* Defaçoz, *Ancien Droit Belgique*, t. 1, pp. 80, 81; citing an ordinance of the Duke of Alba, dated 5th July 1570.

minute of his commission, preserved in the state archives of the kingdom of Belgium, is dated at Mons, 27th May 1580:

PHILIP etc. to all who shall see these presents sends greeting. Since in order to guard, preserve and defend our countries on this side [*the Netherlands, as distinguished from Spain, Naples etc.*] from the enterprises and invasions of the Prince of Orange and other heretics his adherents, and to recover the countries, towns and places which they occupy unjustly and against all right, divine and human, we are now preparing a camp, and an army of men of war both horse and foot, under our very dear and well beloved good nephew the Prince of Parma and Piacenza, lieutenant-governor and captain-general of these countries;

And since in order that we may be so much the better able to keep that army in good discipline and justice, we have found it very requisite and necessary to commission some scholarly person, learned and experienced in the matter of justice, to execute in it the office of judge-advocate-general of the camp [*It will be noticed that this paragraph has become common form*];

We make it known that, considering this and desiring to provide for the advancement of the said justice and the maintenance of good military discipline, and fully confiding in the sense, scholarship (*literature*), loyalty, diligence and experience of our well beloved Master Baltasar d'Ayala, licentiate in the laws, we have, by the determination of our said good nephew the Prince of Parma etc. retained, commissioned and ordered, and do by these presents retain, commission and order him to the said situation and office of judge-advocate-general of our said camp and army, giving him full power and authority and special commandment to execute and perform that office, to give advice and counsel to our aforesaid good nephew the Prince of Parma and others whom it may concern in matters concerning justice, as he shall find to be according to right and reason and conformable to our proclamations and ordinances issued and to be issued thereanent, and for the rest to do well and duly all that a good and loyal judge-advocate-general of the said camp can and ought to do, and that is competent and belongs to the matter;

At such wages and emoluments as by our further letters patent shall be taxed and ordered on that behalf.

The minute then goes on to direct Ayala to take the appropriate oath, which is to include a denial of all bribery for obtaining the said office, always excepting the accustomed fees of the Sieur de Hauteville, state and privy councillor, who on receiving the said oath is to induct Ayala into his office.

By a further order, dated at Mons, 1st August 1580, there are appointed for Ayala, by the month of thirty days, a hundred florins for himself and sixteen each for a clerk, two serjeants and an executioner, for the whole of which hundred and sixty-four florins Ayala is to give a receipt together with an attestation of his having had the said officers in his service.

Three years later Ayala received an accession of power and dignity. By an order dated at Tournai, 20th January 1583, the Prince of Parma appointed him, on the death of Jehan aux Truyes, a member of the great council and master of requests in ordinary, his oath of office to be sworn before the president of that council. But by another order, dated at Tournai, 4th April 1583, reciting that the service of His Majesty, on which in his character of auditor-general Ayala was then employed near the person of the prince, did not permit his going to take the oath at Namur—to which place the great council had been transferred from its usual seat at Mechlin, in consequence of the occupation of the latter city by the forces of the prince of Orange—he is permitted to swear it before the president of the privy council, and is confirmed in the receipt of the salary of his new offices notwithstanding his not being resident at Namur to perform the duties of a member of the great council.

It would indeed seem that the auditor-general had his place so fixed at the side of the captain-general that he required a special command to absent himself, in order to perform elsewhere even duties appertaining to that office. Thus we find an order of the prince directing all officials to assist Ayala in the execution of a command which he had received to accompany the Count of Reulx to Louvain, Aerschot, Liège, Maestricht and other places, in order to enquire into the disorders committed by the troops there in garrison, particularly the outrages which they had done to the commissioners of musters, and to correct and chastise those whom he should find guilty. Thus Ayala's public avocations must not only have been engrossing, but also, as he followed the headquarters of the army from place to place, must have kept him at a distance from libraries. In the time which intervened between his appointment and the dedication of his book, which is dated from the camp before Tournai, 31st October 1581, he can

scarcely have done more than put in order the notes which he had collected before his appointment, and the three years which remained of his life did not allow him to render any further service to legal literature. He died, Nys tells us, "at Alost, 1st September 1584, according to the authorities, but in August, if we follow the text of his successor's commission, which is dated the 20th of that month. He left a natural daughter, Barbe, who married Henry Zoes, professor of law at Louvain, one of the good Belgian jurists of the period, who died in 1627." *

The impression at once derived from reading the work of Ayala is that it is not a treatise of which the system and the parts have been logically thought out, and of which the conclusions are supported by the authorities cited, but a mass of authorities and examples collected from all ages and sources, arranged under the heads supplied by their tenour, and accompanied by the author's determinations on those heads. The learning is first and the thought second. This however does not seem to be attributable to any deficiency of the author, except in the sense that Ayala certainly had not an original mind. His thought ran on the lines which had been handed down for many ages, and demanded no rearrangement of the traditional sign-posts by which its course was marked out. It must be believed that his authorities had been collected during the years which preceded his appointment as judge-advocate-general, in view of a work to be carefully prepared, and that when the press of official business interfered with careful preparation he deemed it better to throw his materials together into such form as he could speedily give them, than to delay, and perhaps risk altogether, the publication of much that was especially appropriate to the time. The want of final polish in arrangement is thus easily accounted for and condoned, but the nature of the author's mind stands out not the less clearly.

The question of Ayala's character is no less interesting than that of his mind. Can we trace what it was in the times in which he lived that most excited his grief or displeasure, and to which

* We must acknowledge our great indebtedness to the work of M. Ernest Nys, now a professor at the university of Brussels and a member both of the Belgian court of appeal in that city and of the permanent international court of arbitration at the Hague, *Le droit de la Guerre et les Précurseurs de Grotius*, 1882, pp. 173-182. Besides other information we owe to this source the official documents which we have translated or summarized.

he most earnestly desired to bring some remedy? The answer to this question may be learnt from the dedication and the preface, which, though no doubt the last parts of the book to be written, disclose for that reason the thoughts of which the abiding force dwelt with the writer when the details of his subject had been dismissed. Of Ayala's dedication to the Prince of Parma the key-note is the necessity of maintaining ancient institutions, and of his preface the key-note is the necessity of maintaining justice. These, and not reason or humanity, were his dominant considerations. His spirit was conservative and stern. Against innovation he would make a stand. In accordance with this bent we find that the first of the three books into which his work is divided begins with the statement that, as the Romans were in all things careful to study law, they followed that habit in declaring war no less than in the things of peace, and that their constant success in war was the result of it. He then devotes the opening chapter to the existence of the Roman *fecials* as a body to which the form of commencing war was entrusted, the fixed law which they observed with regard to that and to the other ceremonies relating to war, and the Roman respect for such law.

II.

BOOK I, CHAPTER 2.

We will now notice the most remarkable among the further contents of the work here offered to the reader, in the order of the text.

It will be well to premise that the three books into which it is divided were evidently intended to bear titles corresponding to the divisions implied in the general title—*De Jure Belli*, *De Officiis Bellicis*, and *De Disciplina Militari*. In each book each chapter except the first has a title of its own, while to the first there is prefixed, in the case of the second and third books, the special title of the book, *De Officiis Bellicis* or *De Disciplina Militari*. In the case of the first book the title which occupies the corresponding position is not, as it should have been by analogy, *De Jure Belli*, but that which logically belongs to it as expressing the substance of the chapter—*De Ratione Belli Indicendi aliisque Caerimoniis Bellicis quae antiquo jure feziali proditae fuerunt*. There is thus some confusion, which may have been made either by Ayala in putting his papers together, or by the printer, who may have been led to omit *De Jure Belli* as the title of the first book because that form does not appear separately in the general title of the work.

It must also be premised that the division of each chapter into sections, quoted here as § § , is made by figures in the margin which are not placed accurately opposite breaks in the context, or even opposite the ends of sentences. Their length is variable, and their origin is difficult to account for.

In the second chapter of the first book we are told at the outset that in general peace is preferable even to a just war with the devastation which accompanies it, but that a righteous war is better than a dishonourable peace. That a war may be called just, it must be declared and waged by the authority and command of the sovereign prince. A private person can not wage

it because he must resort to the courts of law for the defence of his rights; but immediately, as if perceiving the inappropriateness of that reason to a case where the opponent is not amenable to a court of law, Ayala adds that a private person taking any steps of the nature of war without the command of the prince is guilty of *laesa majestas* by the *lex Julia*, the ground of which is the *lex regia*, by which the people has transferred to the prince all sovereignty over itself and all power. If, however, the cause is great and necessary, the prince absent, and delay dangerous, war may be waged even without his order, especially for defence, the right of which is allowed to every one by the law of nature, which includes in that permission not only vengeance but even expelling the enemy from his own land if with less we can not be safe from him. In such cases there will be a just war and the laws of war will have place, because effects follow their causes, and booty will become the property of the captors.

But even the prince ought not to wage war without a just and necessary cause, and ought not to be influenced by any lust for doing harm, for cruel revenge, or for domination: § 10. The principal objects of just war are the defence of one's self and of one's friends and allies, the recovery of what has been unjustly taken away by violence, the vindication of injuries received, and, if the injury has been done by private persons without public authority, their surrender for punishment. The refusal of passage through another's territory will justify war, for passage without doing harm (*transitus innoxius*) is free by the law of human society. That the passage meant is that of a military expedition against an enemy is shown by the example cited, that of the war of the Israelites against the Amorites who had refused them a passage to the promised land: § 11. Nothing more clearly marks the rudimentary conception of neutrality entertained in the time of the renaissance than the assertion of this right, which indeed was still axiomatic to Grotius. But the most just of all causes of war is given by rebels or seceders (*rebelles et imperio deficientes*), for they commit an injury against God, from whom all power is derived: §§ 12, 13. Yet since a rebel can not properly be called an enemy, an armed contention with such is less properly called a war than an execution, and does not require the

authority of the prince, but the order of a judge having jurisdiction will be sufficient: § 14. This, however, is only true so far as regards the measures taken for defence or for the enforcement of jurisdiction. The further rights of war can only be exercised against rebels when the authority of the prince has made the contest a true war, but even then the acts of the rebels, like those of pirates and robbers, will not be covered by the laws of war, and therefore they will not acquire the property of the things which they capture and persons captured by them will not become slaves: § 15.

It will be seen at once that here we are concerned with the question which in consequence of the Netherlands insurrection must have bulked largest in Ayala's thoughts. Accordingly he is not content till he has submitted it to a further examination. Ulpian had said that the parties in civil dissensions were not enemies to one another, so that the laws of war relating to capture and to postliminy should be in force between them, and that therefore enslavement was not the consequence of capture on either side. And the "ordinances of the kingdom of Spain," an authority which must have touched Ayala more nearly, ordered the sevenfold restitution of things captured in the course of civil dissensions. These rules, he explains, as is shown by Ulpian's use of the word "parties," hold when citizens are at variance only with citizens, but those who contend against the majesty of the state and aim at its destruction are deemed to be enemies.

So Cicero considered that the Sempronian law, which made a vote of the people necessary for the capital punishment of a Roman citizen, did not prohibit him from putting Cethegus and Lentulus, the fellow conspirators of Catiline, to death. And so also the Romans habitually visited their subject allies, when insurgent, with the extreme penalties of war: § 16. Indeed the law of Solon, condemning to banishment Athenians who took neither part on the occasion of a popular outbreak, had much to recommend it, and in Ayala's own time the modest patience of so many of the Netherlands people greatly aided the rebels: § 17.

But although the exercise of private judgment between contending parties is admissible in a democracy or an aristocracy

when there are rival governments (*scisso imperio*), in a monarchy every good and wise subject will rank himself on the side of the prince who lawfully enjoys the supreme power: § 19. For as soon as it has been determined that the commonwealth shall be administered by one person, to whom by the *lex regia* the people have granted all rule and power over themselves, and who is the common parent of all, there is the same duty to defend him that there is to defend the country: § 20. Armed resistance to him is parricidal and can never be justified: § 21. The prince and the commonwealth are so connected that no one can be the enemy of one without being the enemy of the other: § 22. Rebellion against the prince is comparable to heresy, and a person disobedient to him is called *infidelis*, the double meaning of which term—faithless and infidel—is justified by the question of St. Jerome, “how can a man be faithful in the matter of God (*in substantia Dei*) who could not keep his faith to his lord in the flesh?” To obey kings is ever the general pact of human society, and while good kings are sent by God, bad ones must be endured and their misdeeds referred to his judgment: § 23. It follows that although a usurper (*tyrannus*) who has seized the throne by illegal violence may be lawfully killed by any one if the usurpation can not otherwise be ended, it is not lawful for a private person to kill, or for the people to reject or to revolt against, one who is the prince by right of succession or election, however cruelly or unjustly he may act: § 24.

It must be noticed with reference to this passage that on 15th June 1580 the prince of Parma had issued the edict which set a price on the head of the prince of Orange, and that on 26th July 1581 the Dutch states-general had declared Philip to have forfeited the sovereignty. Ayala must have written with these recent facts expressly in view. He proceeds to declare that all rule and power over the people are concentrated in the person of the prince not only by the *lex regia* but by the ordinance of God: § 26. But the pope, to whom both the spiritual and the temporal swords have been committed on earth, may depose kings, while popular power is worse than that of any single tyrant: § 27.

From the amplifications on state government into which the mention of war against rebels has led him Ayala returns to the

just causes of war. It can not be waged against infidels merely because they are such, for God, who makes his sun to rise on the just and on the unjust, has not given the lordship over things to the faithful alone but to all creatures endowed with reason: § 28. Nor can the justice of war against infidels as such be deduced from their refusal to obey the emperor, for although it is a common opinion that the emperor is the lord of all the world, yet the most learned men, whose teaching is summed up by Covarruvias and Ferdinand Vasquez, have proved the contrary: § 29.

Here it will be noted that Ayala's Spanish origin and sympathies keep him on the side of the protest which Spain, France and England, the homes of independent nationality, maintained throughout the middle ages against the German and Italian doctrine of a world-emperor. The boundary of the authority which the prelates of the Church, even the pope himself, have received, is to be drawn between those who have never accepted Christianity, with regard to whom St. Paul asked, "what have I to do with them that are without?" and those who have once submitted to the Christian faith but have fallen from it, against whom as heretics war can be justly made: § 29. Against infidels, however, war can be made for the same causes as against any one else, also when they hinder the Christian faith by blasphemy or false argument (*pravis persuasionibus*); or when they hinder the preaching of that faith, and so do an injustice to Christians, who have the right of preaching the gospel throughout the world: § 30.

The causes of war which have been reviewed, Ayala next says, are to be very carefully weighed by princes and kings, but if it happens that these are led into war by greed the soldiers will not be guilty, for they must obey their prince: §§ 30, 31. But in § 32 this is qualified by the reservation, "unless it is clearly established that the war is unjust." The question thus raised was an old one, and our author cites in his support Saint Augustine, who begins with a pronouncement in the sense of the wide one first made by Ayala, and proceeds to base it on grounds which are scarcely satisfactory. He points out that in peace the soldier is the subject even of a sacrilegious king, and that in war the commands given him are either certainly not contrary to the law of

God or at least not certainly contrary to it, so that there is a chance (*fortasse*) that the king may be guilty by reason of the commands and the soldier innocent by reason of his servient position. It is remarkable that Ayala does not go further into the authorities, for they are interesting. In feudal times the duty of allegiance to a lord had reinforced that drawn from simple civil subjection. In the treatise entitled *Feudorum Consuetudines*, which is commonly printed as an appendix to the *Corpus Juris*, we read (lib. 2, tit. 28) that according to some the vassal must always aid his lord, without any distinction of case, but that according to Obertus de Orto and Gerardus Campagistus, whose opinion the author of the treatise adopts, this in an unreasonable war is only true for the lord's defence, and the vassal will not lose his fief for refusing to aid the lord in an attack. Having regard to the disputable reasonableness of most wars, and to the possibility of representing an attack as a really defensive measure, we can hardly doubt that the feudal liability, even as interpreted by Obertus and Gerardus, would have a practical tendency in favour of the claim of a pugnacious lord. We find therefore without surprise that Thomas Aquinas does not so much as notice the existence of a question, but says unreservedly that "a private person who uses the sword under the authority of the prince or judge does not take the sword, but uses a sword placed in his hands by another": *Summa Totius Theologia; secunda pars, quaestio XL, art. 1; utrum bellare sit semper peccatum*.

But the received opinion of the sixteenth century did not go quite so far, for Nys quotes Franciscus de Victoria as laying down that subjects must not take arms in a manifestly unjust war, but that if the notables of the nation, consulted by the king, pronounce in favour of the justice of the war, the classes below them may in good conscience conform themselves to their decision.* Indeed the increasing employment of hired soldiers, whose voluntary engagement would deprive them of the excuse either of feudal allegiance or of the duty of a simple subject, could scarcely fail to inspire moralists with a hesitation which is perhaps reflected by Ayala. Certainly, a little later, Suarez holds mercenaries to

* *Les Origines du Droit International*, p. 174.

be strictly bound to enquire into the justice of the cause for which they fight.†

At this point Ayala tells us that all he has so far said about just causes of war relates rather to right and equity, and to the duty of a good man, than to the legal effects of war; and he makes a sudden transit to the other sense of *justus*, namely lawful by reason of fulfilling certain legal requirements, as in the case of lawful marriage, lawful age, and so forth. In that sense it is possible for a war to be *justum* on both sides, and for a war declared between persons capable of being enemies and not brigands to entitle each side, however plainly unjust, to the rights of war, such as postliminy and the enslavement of prisoners. This was rightly maintained by Alciatus and Fulgosius, in opposition to the received opinion based on the justice of the cause, which can not exist on both sides: §§ 33-35. Here then at last Ayala is alive to the difference between the provinces of the legist and the moralist in what concerns war. Had he recognised it earlier in his work, he might have discussed more clearly the duty of a soldier in an unjust war. But the time was not yet come, either for him or for so much greater a man as was Aquinas, to think adequately on a question involving the rights and duties of conscience.

The short remainder of the second chapter is devoted to the question of the expenses of war. The prince ought primarily to bear them out of any revenues assigned to him by the people, but if these are insufficient the whole kingdom must bear the burden, and it can not be limited: § 37. The soldier ought to be paid: § 38. And, serving for pay, he has no claim for his losses in the war to be made good, as he would have were he not paid. But if he has been summoned to fight in an unjust war, he will have no right of action either for his pay or for his losses, because *ex causa turpi nulla datur actio*: § 40. Surely Ayala did not mean that a prince or a commonwealth might plead in court the injustice of his or its own war, as an answer to an action arising out of it? It would rather seem that the veil obscuring the confines of morality and law, which had been raised for a moment, had

† Nys, u. s., p. 175.

fallen again, and that Ayala had no clear view of the question which he had raised.

Thus closes Ayala's second chapter, in which without much arrangement he has disburdened his mind of the general matter which he most desired to impress on his contemporaries, and has left himself free to enter on the topics of detail which follow. It should have shielded him from the imputation of neglecting the just causes of war, by making which Grotius showed that even his prodigious memory was not infallible.

III.

BOOK I, CHAPTERS 3-5.

The third chapter of the first book is devoted to Single Combat. The admission of that subject into a book on war is a scholastic feature, belonging rather to the time when war, as a public national contest, had not been so far differentiated from fighting in general as even Ayala had differentiated it in what we have already passed under review. He condemns single combat on the usual grounds, except as between soldiers on the opposite sides of a regular war, by the order or with the consent of the general (§ § 7, 8, 9), or when the princes on both sides agree to refer their differences to the combat of two or more selected champions (§ § 10, 11), even in which case, however, Ayala deems it an imprudent mode of seeking a decision, because, as Livy says, a settlement which promises to be lasting is reached only when the defeated party has contended with all his might (§ § 12, 13). Either the notion, if Ayala really entertained it, that these exceptional cases could occur in the days of Philip the Second and the Dutch Republic, or the apparently serious mention of them without such a notion being entertained, further shows the merely scholastic character of the chapter.

In the fourth chapter Ayala discusses reprisals. He condemns them so far as affecting the person of any but the guilty party, basing himself on the Deuteronomic precept, "the fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin": § 3. And on the principle quoted from Ulpian in the Digest—lib. 9, t. 2, l. 13—that no one is lord over his own limbs—*dominus membrorum suorum nemo videtur*: § 6. From that principle Ayala concludes that not even under a law or statute, to which every one is presumed to have consented, can any but the guilty party be affected by corporal penalties, though he may be so by pecuniary ones. Of course the penance imposed

by Saint Ambrose on the Emperor Theodosius is cited: § 7; and the biblical examples to the contrary are pronounced to be beyond human imitation: § 4.

The right of reprisals on property exists because human law, for the good of the commonwealth and the better repression of offences, may punish by fine, confiscation, diminution of honour and the like, even those who have committed no offence; and so it has often been enacted both in civil and in canon law, especially for the sons and descendants of those who have sinned against divine or human majesty: § 5. Hence a prince may authorise reprisals on property against a people who will neither redress the injuries done by those whom they harbour, nor give up the guilty to punishment. The practice rests on the same foundations, divine, natural and civil, as war, and the authority of a sovereign who has the right of declaring war is necessary for such reprisals: §§ 2, 10. The authority of a judge is not sufficient, and they no longer take place between fellow subjects, whatever may once have been the case at Athens or elsewhere: § 10. When reprisals on property have been duly authorised, although the innocent can not be personally attacked but only their goods taken, they may be accidentally killed, because otherwise the reprisals could not be executed. It is just as in war, neither the innocent nor women and children can be killed of set purpose, yet they may be so by accident, as when a city is besieged or bombarded, because war could not otherwise be carried on: § 9.

The fifth chapter of the first book is devoted by Ayala to capture in war and to postliminy. It is characteristic of the looseness of his style that, although the principles on which he considers the lawfulness of capture to depend are glanced at in §§ 1 and 2, they are fully explained only when he comes in § 16 to the enslavement of prisoners. His view is that in the primitive age, the golden age as the heathen called it, all men were born free and were deemed to be peers and equals, and all things were enjoyed in common. This state of things he refers to *jus naturale*, which he says did not enact that men should be free, but slavery and property were unknown, and its resulting silence about them left a loophole for the later creation of those institutions. Evidently then the ambiguous term *jus* in Ayala's *jus naturale* does not

mean law, but what might be called a right, in the sense of an enjoyment which no one questioned. He goes on to say that in later times, when, because of increasing wickedness, such a state of things was found inconvenient, natural right reason, than which nothing is more divine, dictated the institution of property, and of war with capture and enslavement as the rights of war, which thus by universal consent became the *jus gentium*. That term, in which *jus* appears as law, Ayala uses in its classical sense of the law in which the people of all nations are agreed and which they apply in their respective communities—a fact, or supposed fact, which carries with it as a consequence the application of the same law to the mutual relations of those communities, in other words its operation as what we call the law of nations.

The law of nations is thus accounted for as positive law, but to what extent is it a righteous law? So far as concerns the laws of war Ayala teaches that they are not wanting in an equity based on the repression of injustice—§ § 1, 16—and that they do not exist in favour of brigands, pirates, or any one who is not a lawful enemy: § 18. If the remark had been made that even within those limits the laws of war may operate in favour of the unjust party, we do not know what Ayala's answer would have been, but probably he would have said that the just must at least be armed with the means of repression, although the decrees of Providence may sometimes deny them that effect. And one limitation of the rights given by the general laws of war is furnished by the ancient and laudable custom—for Ayala does not put it higher than this—that in a war between Christians those who are captured on either side do not become slaves but are kept as freemen for ransom. Even that limitation does not enure to the benefit of Christians who fight for Saracens or infidels, or render them any kind of aid, only although enslaved by capture they must not be sold to any but Christians: § 19.

The law that the property in captured things passes to the captor applies only to movables, for captured immovables, such as land, become the public property of the victor commonwealth: § 3. And even with regard to the enemy's movables, it is only those that are acquired without a battle that belong to whosoever has first gained possession of them: § 8. The losing owners of

the booty acquired in battle are indeed deprived of their property in it, but its disposition is subject to the prince's pleasure, unless the proportional shares to be retained by him and to be assigned to the others concerned are fixed by law, as the Spanish ordinances fix them for land war, leaving to the prince's liberality what he will allow to the others out of captures made in naval war of which he bears the cost: § 9. It is apparently because of this difference that Ayala mentions those ordinances as assimilating captured ships of war to land rather than to movables in general: § 3. Certain examples relating to booty and founded on reason are cited with an evident intention of acting on them in the performance of the author's duties. Such are that those who guard the baggage are to share equally with those who fight: § 6; that the troops are not to throw themselves on the booty till the victory has been secured: § 11; that those who have not done their duty shall lose their shares: § 13; that fraud in the division of the spoil may be punished by fines in addition to the loss of the shares: § 12; and that the troops may be ordered to sell the spoil which they are allowed to acquire lest the army should be hampered and seduced from duty by it: § 14. It is also laid down that things entrusted to the care of a sacred institution but not belonging to it, *res sacro commendatae*, are not immune from capture if enemy's property: § 15.

In §§ 20 to 24, Ayala deals with various questions about the recovery of personal conditions by postliminy, and then introduces some observations of which the leading purport appears to be the treatment of prisoners. In § 25 we learn that women and children are subject to capture and enslavement but must not be put to death, and that enemies found in our country at the outbreak of war may be made prisoners but can no longer be enslaved as formerly they were. Also that canon law forbids touching priests, monks, lay brothers, travellers, merchants and country people, but that the prohibition has been repealed by desuetude, except, in Ayala's opinion, for ecclesiastics so far as they do not meddle with affairs of war. No legal relief can be given against a bargain which a captive has made for his ransom, because the fear of death or servitude which was its motive was not inspired as a means of extortion, but was a lawful fear arising out of his

situation: § 26. In § 27 we learn that prisoners and the fixing and enjoyment of their ransom are now generally left to their captors, except in the case of grandees whose ransom exceeds ten thousand crowns. These by the ancient custom of Spain, France, and England, belong to the prince. They must be admitted to ransom unless there is reason to fear from them a renewal of the war, for to spare them in that case would be an unjust mercy, as Saint Ambrose says. Thus the Roman generals at the end of a triumph put to death the leading captives, who had sown the seeds of discord and were the authors of the war. But no killing or harsh treatment of captives by private authority is allowed, any more than by civil law it is allowed in the case of slaves; and a Spanish ordinance is to that effect in the case of captives made in a war between Christians, though not in a war between peoples of different religions: § 28.

We now come to various points about ransoms: §§ 29 to 32; and then return to postliminy. The ancient rule that on its being recovered from the enemy land returns by postliminy to its former owners is followed by the Spanish ordinances, subject to a proviso for the case of governments, kingdoms, countries, and other major proprietary rights, that usucapion does not run for them even from the date of their recovery; but minor proprietary rights will be acquired by prescription against the former owner, not being under age, in four years from the date of their recovery. And if a subject loses his own castle by his own fault, and retakes it by his own exertions, still the king will be entitled to claim it on its recovery: § 33. It is easily seen what a field for the application of these provisions must have been afforded by the constant border warfare with the Moors, of which a frequent incident would be the taking of Christian property by the latter and its retaking by the former owner or by an adventurer.

In § 35 Ayala mentions and rejects a number of general statements and distinctions made on postliminy by various writers. His own position, as may be collected from §§ 34 to 38, is that the first question to be asked is whether a corporeal thing captured by a lawful enemy, not by a pirate or robber, is one of those which are capable of postliminy, such as land, ships, riding or baggage animals, and men, whether free or slave. If it is not such, of

which arms are an example, because they can not be lost by a living man except through his fault, it is at once the captor's booty. If it is such, the next question is whether the enemy has secured at least a temporary possession of it, that is, in the common phrase, whether it has been brought *intra praesidia*. If this has not happened before the thing is recovered, the property in it has not been displaced, and the recoverer must restore it to its owner, whether he recovered it by force of arms, by purchase, or in any other way, except that if he recovered it by purchase the owner must repay him its price. If, however, the thing has been brought *intra praesidia*, its property has passed to the captor by the laws of war, but on the recovery of the thing the property will return to the former owner by postliminy. And if the recoverer was a fraudulent party to the capture, he will be liable to the former owner not only for the restitution of the thing recovered but also for what he might have saved from capture. In § 39 Ayala notes the Spanish ordinance which applied the question whether booty had been brought *intra praesidia* to captures made by pirates as well as to those made by an enemy, and can only account for it by supposing that "its object may have been to stimulate the troops in the pursuit of pirates and robbers, especially since it is legitimate to make provision for the public good even at the cost of private persons, as Tacitus says that every great example has some injustice to individuals which is compensated by the public utility." In § 40 Ayala expresses a rather hesitating opinion that a thing first stolen, then captured by an enemy and lastly recovered, need not be restored to its former owner, the law of war which changes the property prevailing over the civil rule that the vice of theft, which clings to the thing stolen, is not purged until the thing has returned to the owner's power; but he is clear that equity prohibits suit against the possessor in such a case unless the value can not be recovered from the thief or his heir.

The closing §§ of the chapter, 41 to 43, deal with the questions whether incorporeal rights can be captured in war and transferred to the conqueror, and, if so, whether they are subject to postliminy. On the first question Ayala decides in the affirmative as to the incorporeal rights of a conquered community,

because such rights are the creditor's property, and the property of a conquered community passes to the conqueror together with the persons forming the community. He can give laws to them, and one who is in another's power can have nothing in his own power. Therefore when Alexander had conquered Thebes he was competent to receive from the Thessalians the hundred talents which they had borrowed from the Thebans, and if he had done so, the Thebans, when their city was restored by Cassander, would have had no claim against the Thessalians.

On the second question Ayala admits that there may be postliminy of an incorporeal right, and that, since Alexander had merely assumed to remit the debt to the Thessalians, the restored Thebans were entitled by postliminy to exact it from them, and would have been so in whatever legal form the remission might have been made. In that case there would have been law against law, and the nature of the law of postliminy is to prevail over the law of capture. If there had been payment to Alexander there would have been law against fact, and "the law of postliminy does not restore those things which have been removed by lawful fact, for law has no supremacy over fact." But the incorporeal rights of a private person pass to his captor only when he is made a slave, who can have nothing of his own, and now that between Christians a prisoner does not become a slave his incorporeal rights adhere inseparably to him.

The question is quite differently regarded by Grotius. There is, says that jurist, no postliminy of a debt, and the absolute right which Alexander acquired by the conquest of Thebes made his remission of their debt to the Thessalians as effectual in law as their payment of it to him would have been. Moreover there was no restoration of the Thebans, for their city had been dissolved by the conquest, and the Thebes which Cassander set up again was a new entity. *De Jure Belli ac Pacis*; 1. 3, c. 9, § 9.

IV.

BOOK I, CHAPTERS 6-9.

The sixth chapter is devoted to the subject of keeping faith with an enemy, and is a tolerably full and, with one important exception, a good discussion of that subject, with the connected one of the law and ethics as to keeping promises made in civil life, whether with or without the sanction of an oath. The exception is that Ayala repudiates any duty of keeping faith with those whom he regards as rebels. He has pointed out that pirates and robbers, as being the common enemies of mankind, can not claim the performance of the engagements which they may have it in their power to extort: § 6. This he extends to rebels, as also not being lawful enemies: § 7. And, "as a consequence," conventions which have been extorted by a usurping force (*per tyrannidem*) are not binding. In their case there has been no consent, which is required in all contracts, for consent is vitiated by unlawful force. It is doubted by most whether a prince is ever bound by a contract with his subjects, but certainly if they have wrung the contract from him by insurrection, which is in itself a breach of their faith to him, they can not claim faith from him. Nor can it be expected that those who have violated both divine and human law, by taking arms against their common parent who has received his power from God, will themselves keep their word.

Again, subjects can not give the law to their prince; therefore any promise by him to them is a voluntary one, which can never be binding. The common doctrine of the canonists, that the pope's hands are never bound, is based on these principles. And if a prince is injured by a contract he has the same right as one under age to be relieved from it: § 8. The rights of the crown are inseparable from the crown, and as the prince can not lose his sovereign power by a voluntary abdication, or alienate any part of his kingdom, so he can not alienate any of those rights. nor

can they be lost by the longest term of prescription. The prince is only a usufructuary, or at most holds his crown as a husband holds his wife's dowry: § 9. Bodin, seeing the insecurity of any convention made by insurgents with their prince, advised them not to be parties to such a convention, but to get some foreign prince to contract for them; but Ayala advises them rather to return to their duty and seek the clemency of their prince: § 11.

It is an interesting problem how historical characters such as Charles I. of England, and many of their supporters no less, who were not on the whole bad men, can have been morally blind on that side of conscience which relates to political compacts with subjects. The arguments which have been quoted in some detail are interesting as showing the question as they saw it. The base of their position was the belief in a divine external order which, where it is entertained, makes impossible secure political compromises affecting that order. The common humanity on which the duty of keeping faith must be founded is not felt, by those who identify themselves with a divine will to which they attribute institutions, to exist between them and their opponents.

Except on the point which has been examined Ayala's standard of faith was high. Faith must be kept towards a lawful enemy by a private person as well as by the state or its representatives, and Regulus did no more than his duty: § 2. Engagements must be interpreted without quibbling on their letter: § 4. Giving hostages does not permit a treaty to be broken, as if they were a substitute for faith, the erroneous doctrine by which Bodin defended the conduct of Francis I. If the French authorities whose consent was necessary refused it to the treaty of Madrid, Francis ought to have saved his personal faith by returning to captivity: § 5. But even towards a lawful enemy faith is not to be kept if that which was promised would offend God or be contrary to good morals: §§ 13, 14. All our actions ought to be referred to the ground principles of justice; first, that no one be injured; secondly, that the common utility be served: § 15. Breach of a treaty by one party exempts the other, at his discretion, from the duty of observing the same treaty, unless the broken clause is such that it is not likely the contracting parties attached much importance to it; but it does not authorise the breach of another

treaty: §§ 17, 20, 22. The rules of faith are the same for truces as for treaties of peace or alliance: § 18. But it is usual and right, though not a matter of law, that a slight breach of a truce which will shortly expire should not be treated as ending it: § 19. The perfidious character of an enemy, though often shown, does not warrant a breach of faith towards him: § 21.

The seventh chapter begins with a distinction of treaties into three kinds—those which end a war by the complete surrender of the enemy, who thenceforward enjoys only such existence as the conqueror allows him—those which end a war on terms, possibly including the enemy's recognition of the conqueror's superiority (*ut is populus alterius populi majestatem conservet*)—and those which are concluded in time of peace, possibly including a similar recognition by one party. But no use is made of the classification. A general's commission, even when conferring plenipotentiary power on him, does not enable him to conclude a peace, unless that power is expressly given: § 5. Truces for long terms, equivalent to peace, fall under this rule, but not short truces: § 6. It will be remembered that in Ayala's time the Ottoman empire concluded peace with non-Moslem powers only for terms of years. In extreme necessity the prince may conclude a treaty not only abandoning private property of his subjects which is in the enemy's hands, but even taking other property from his subjects and giving it to the enemy, for the common utility is to be preferred to that of individuals: § 7. It would rather seem, though it is not clear, that Ayala did not consider that subjects were entitled to compensation from the prince or the public treasury for property so taken. When a prince dies who has concluded treaties in the name of the commonwealth, they subsist both against and in favour of his successor, whether taking as heir, by a statute or by election; unless where things annexed to the crown have been alienated without the necessary consent of the people or of the estates (*citra populi vel ordinum consensum, qui ad hoc requiritur*), or where the dignity and authority of the prince (*majestas principis*) have been impaired, which could not have been validly done to the prejudice even of the deceased: § 10. The last reservation can not have been intended to apply to treaties with foreign powers, since Ayala, as we have seen, ad-

mitted that a treaty either of his second or of his third kind might include an admission of the superiority of one party. The purport clearly is that no perpetually binding close can be given to a civil war by an agreement limiting the prince's prerogatives, in accordance with what Ayala has taught in the preceding chapter about its not being a duty to keep faith with rebels.

The eighth is a commonplace chapter on lawful stratagem and fraud in war, in which no principles are laid down by which cases may be distinguished.

The ninth chapter is on the rights of ambassadors, and contains nothing remarkable except Ayala's refusal of such rights to rebels and to subjects who serve an enemy with treasonable intent. On that ground he considers that the imperialists were within their right in putting to death the subjects of Charles V. who were commissioned by the king of France as ambassadors to the Grand Turk, but he does not notice that, whatever their personal condition, they could have no rights against the emperor as ambassadors from an enemy to a third power: § 5. The man of God who was eaten by a lion for disobeying the divine order not to accept meat or drink from Jeroboam, whose sin he had been sent to denounce, is brought in as a warning to princes not to treat with rebels and schismatics: § 6.

V.

BOOKS II AND III.

The second and third books contain little or nothing that belongs to international law. Ayala's object in them seems to have been to bring together all the maxims of policy or prudence which he could find relating to war, whether apprehended, being waged, or leaving questions behind it—whether again such maxims were generally accepted or were debated. This must not be understood only of maxims belonging to philosophy, statecraft, or administrative science; even strategy and tactics are not wholly outside Ayala's purview, although he says comparatively little about them, probably because in the then condition of military art little of a general character had been said about them. The merest technicalities of the military or naval profession are all that he avoids. The authorities and examples are mostly taken from classical or biblical antiquity, and next in frequency come those of Spain, as where the extreme severity of the Spanish ordinances for the case of the surrender of a castle is commented on: book III, chapter 18, §§ 2, 5. Of course the difference of circumstances and institutions would render a large part of what Ayala has thus collected inapplicable to the Low Countries in the sixteenth century, but we shall probably not be wrong in thinking that he, as a special devotee of learning, was haunted by a notion, due to the adoption of Roman law in the German or Holy Roman empire, that more practical use might be made of his vast collection than it would now occur to any one to think possible. An instance may be seen in book III, chapter 7, § 27, where he argues that the privileges of Roman soldiers still belong to them, against what he admits to be the general opinion, but claiming to have the most learned on his side. A notable instance of an opinion ventured by Ayala on his own authority, not supported by any citation of a writer but only by examples, is that a man of some position (*nobilis*) may act as a spy not only without discredit but even with glory, when his motive is zeal for the public good; though he admits that to do so for pay would be discreditable to him: book III, c. 13, § 6.

J. WESTLAKE.

BALTHAZA-

RIS AYALÆ, I. C. ET
EXERCITVS REGII APVD
BELGAS SVPREMI IVRIDICI,

DE IVRE ET OFFICIIS BEL-
LICIS ET DISCIPLINA MILITARI,
LIBRI III.

*Non in multitudine exercitus victoria belli;
sed de calo fortitudo est. 1. Mach. 3.*



D V A C I,
Ex officina Ioannis Bogardi Typogr.
iurati, sub Bibliis aureis, anno
M. D. LXXXII,





SERENISSI-
MO PARMÆ ET PLA-
CENTIÆ PRINCIPI,
ALEXANDRO FARNESIO,
Regis apud Belgas Præfecto, & Im-
peratori felicissimo, BALTHAZAR
AYALA I. C. S.



I qui de republ scri-
psere, Princeps se-
renissime, ad reipub.
salutem & conser-
uationem præcipue
spectare censent, ut
actiones nostras, iu-
ra, & leges, ad vete-
rum mores, & instituta maiorum sapius re-
uocemus. *reipub. enim, ut picturam egregiam,*
sed euanescentem vetustate, si eam coloribus
iisdem, quibus fuerat, renouare neglexerimus,
nec formam, nec extremalineaamenta seruare:
& ut in corporibus humanis, sic quoque in
ā 2 reipub.

EPISTOLA

repub. quotidie aggregatur aliquid, quod curatione indiget: & senescentibus legibus maturescunt vitia, quae rempub. haud diu stare permittunt. unde Ennii versum, quo dixit, Moribus antiquis res stat Romana, virisque, vel breuitate, vel veritate, tanquam ex oraculo effatum censet Cicero. Nam neque viri, inquit, nisi ita morata ciuitas fuisset, neque mores, nisi i viri praefuissent, aut fundare, aut tam diu tenere potuissent tantam, & tam iuste lateque imperantem rempub. Itaque & mos ipse patrius praestantes viros adhibebat, & veterum morem, ac morum instituta retinebant excellentes viri: qua ratione Romana respubl. & creuit, & stetit. Imperium enim, ut inquit Sallustius, his artibus facile retinetur, quibus initio partum est. verum, ubi pro labore, desidia, pro continentia, & aequitate, libido, atque superbia inuasere, fortuna simul cum moribus immutatur. quod & Apollo oraculo suo significasse videtur, quo, consultus quando tandem malorum, & seditionum, quibus Graecia miserè affligebatur, finis esset, respondit, tum demum calamitatem Graeciae cessaturam, cum ipsius aram, quae apud Delios erat cubica, duplicassent. quod Graeci facile arbitrati, cum alteram tantam molem, quanta prior erat, adiecissent, neque tamen malum leniri sentirent; & non

in suis de rep.
lib. 16.

DEDICATORIA.

Et non satis rite oraculo satisfactum ex eodem deo intelligerent, tandem edocti a Platone, & aliis philosophis, cognouerunt non molem moli, ex oraculo Apollinis a quandam esse; sed Analogiam cum Analogia, & rationem cum ratione componendam. atque ita sapientium virorum prudentia, & consilio, ad veterum normam, institutaque maiorum rebus constitutis, omnibusq; suo loco repositis, malum mitescere, & pristina felicitas redire cepit. Hinc quoque Horatius percipiens, quantum calamitatis inuexisset contempta religio, ad Romanos scribit, Carmin. l. 3. ode 6. his versibus:

Delicta maiorum, immeritus lues,
Romane, donec templa refeceris,
Ædeisque labentis deorum, &
Foeda nigro simulacra fumo.

Et qua sequuntur. quibus ostendit, quantum degenerauerint Romani a suis maioribus, ob violatam religionem, & neglectum veterum morem. Et huius rei præclarum exemplum nobis exhibet Romana historia, ut dilucidè proponit Lilius, qui corruptis Romanorum moribus, lib. 5. neglecta deorum religione, & iure gentium violato, urbem captam & partem deletam a Gallis refert: quæ rursus Camilli virtute liberata, cultu diuino restituto, legibus institutisq; maiorum reuocatis, de violatoribus iuris gentium

EPISTOLA

supplicio sumpto, mirum in modum creuit, &
 tandem totius orbis imperium adepta est: ut
 merito dici possit, urbem Romanam multo ante
 perituram fuisse, nisi perisset: aut saltem nun-
 quam ad tantum fastigium peruenturam. Cu-
 ius exemplo Sereniss. Princeps, speramus fore,
 ut tua praecleara virtute, & mira in rebus ge-
 rendis dexteritate & providentia, veri Dei cultu
 restaurato, & Maiestate Regis, quae diuino &
 humano iure illi debetur, reparata, diuinarum
 humanarumque rerum perturbatio in Belgium
 inuecta, diuini numinis auxilio, sedari & tolli
 aliquando possit, & totum Belgium pristinae
 felicitati reddi. de quo dici potest, id quod sacra
 Iudith cap. 5 *litera de Israëlitis habent: Vbicunque ingressi* 22
sunt, sine arcu & sagitta, & absque scuto & 23
gladio, Deus eorum pugnavit pro eis, & vicis: 24
& non fuit, qui insultaret populo isti: nisi 25
quando recessit a cultu Domini Dei sui. Quo- 26
tiescunque autem prater ipsum Deum suum, 27
alterum coluerunt, dati sunt in praedam, & in 28
gladium, & in opprobrium. Porro cum in ci- 29
vili & togata societate, leges constitutionesque,
 sapius renouari, & ad veterum instituta rese-
 cari expediat, (qua de causa etiam veteres illi
 Romani censores creauerunt, qui censendis ci-
 uium moribus, qui facile negligentia corrup-
 puntur, antiquum decus, & morum integritatem re-

DEDICATORIA.

tem retinebant:) tum profectò omnium max-
 m: in bello id fieri conuenit, eò quòd aspero &
 abscisso castigationis genere, disciplina milita-
 ris indiget. Quia, ut inquit Val. Max. vires
 armis constant, quæ ubi semel a recto itinere
 descuerunt, oppressura sunt, nisi opprimantur.
 Et certè tantum in disciplina militari passum
 est, ut ea sola retenta vel neglecta, maxima cla-
 des illata vel accepta, plurimi exercitus casi vel
 seruari, amplissima denique imperia parta vel
 collapsa sint: ut in huius operis progressu latius
 ostendemus. Ceterum cum belli gloria longè
 maxima apud Romanos fuerit, qui suum con-
 ditorisq; sui parentem Martem ferebant, ad
 eamq; sola disciplina militari (quod præcipuum
 decus & stabilimentum Romani imperij vocat
 Valer. Max.) peruenierint, eademq; labente pau-
 latim magis ac magis præcipites iuerint, donec
 tandem una cum virtute maiorum, & impe-
 rium & gloriam amitterent: operæ præcium me
 facturum existimaui, si per quos viros, quibus
 artibus, quo genere disciplina, tantam in rebus
 bellicis gloriam meruerint (quatenus studio
 iuris & historiarum lectione consequi potui)
 proponerem. Ex quibus certè liquebit, eadem
 ingenia hominum, quæ nunc sunt, & olim
 fuisse: eosdem quoque casus & euentus rerum,
 qui imities contingunt, & olim euenisse. unde

EPISTOLA

non difficile erit ei, qui antiqua diligenter expenderit, & perpenſo iudicio examinauerit, & retroactis (quod proprie ſapientis viri officium eſt) præſentia iudicare futura proſpicere, & ex veterum exemplis, propter caſuum ſimilitudinem, conuenientia remedia malis adhibere: quibus neglectis, in eundem lapidem ſapius impingimus. Neque enim, ut Ariſtides dicebat, in bello tam armis res magna geruntur, quàm prudentia & conſilio. Itaque Xerxes, cuius exercitū & terra, & mare vix capere poterat, vnius Themistoelis induſtria ſuperatus fuit. & Romanis, neque multitudo, neque vires maiores, quàm ampliſſimis regnis, & ferociſſimis Barbaris fuerunt: ſed principes eos fecit ſeueritas inſtitutorum, & ordo militiae. Vnde Agamemnon non optabat, ut Aiacis ſimiles haberet decem, ſed ut Neſtoris & Uliſſis: quorum conſilio & prudentia non dubitabat quin breui Troia peritura eſſet. & Salluſtius diu quidem magnum inter mortales certamen fuiſſe ſcribit, vine corporis, an virtute animi, res magis militaris procederet: ſed poſtea periculo atque negotiis compertum eſſe, in bello plurimum ingenium poſſe. Lucullum verò ſcribit Cicero, cum eſſet Roma ad Mitridaticum bellum proſectus, rei militaris planè rudis, legendis rebus geſtus, induſtria & ingenio,

tantum

Acadequeſt.
lib. 2.

DEDICATORIA.

tantum imperatorem in omni genere belli existisse, ut confessione & iudicio Mithridatis, regis post Alexandrum maximi omnibus, quos ipse legisset, ducibus præferretur. Quare prudenter Alphonsus Aragonum rex, rogatus plusne armis, an libris debeat, respondit. Ex libris arma, & armorum iura se dedicasse: aperte professus, se doctrina omnia debere. Quo spectat quod Iustinian. imperator ait, militarem rem tam legibus in tuto collocatam esse quam leges armorum præsidio servatas, & horum alterum alterius auxilio semper eguisse. Nam si rectè iudicare volumus, non magis leges sine armis, quam arma sine legibus & disciplina reipub. utique florentissimam ullo modo tueri possunt. Quæ cum ita sint, Sereniss. Princeps, hunc qualemcunque laborem meum T. Cels. non ingratum fore confido; munus certè exiguum, & splendori tuo indignum: sed ad præsentem rerum statum, nisi fallor opportunum. in quo recensendo, graues fortasse nimium, & seueros censores monitos velim, eius quod Q. Fabius Max. Q. Fabio Max. filio consuli dicebat, aliter in medio ardore belli, aliter in pace tranquilla arbitrandum esse. multa enim quæ in pacis otio vindex disciplina persequitur, inter turbas & gladios veniam merentur. T. verò Cel. Sereniss. Princeps, hoc quicquid est

in l. 1. C. de
Iustm. cod.
confr.

PRÆFATIO

vel studij vel laboris, dedicaui: tum quòd mea interesse putarem, eam non ignorare quid agerem, & qua studia tractarem, dum a publicis functionibus vacarem: tum quòd militaria hac nemini magis conuenire arbitrarer, quam tibi tanto Imperatori, & disciplina militaris amantiſſimo. Cuius actiones Deus optimus maximus dirigat, eundemque nobis quàm diutiſſimè seruet incolumem. E castris ante Tornacum, pridie Kal. No- uemb. 1581.

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PRÆFATIO DE IVRE  
BELLII.



Uelchrè a Pyndaro pleriq; dictum existimât, bellum tyrannum esse, & legem omnium reginam. nihil enim legibus, quæ diuinitus nobis datæ sunt, tam contrarium, quàm vi agere; quod proprium est bel-luarum. & quemadmodum aquilæ vn-guis acumen, & leoni dentium asperitas: sic homini rationem (quam rectè I. C. animam legis esse voluerunt) datam esse: qua sola contédere & se tueri debet. Vnde quamuis rempub. sine iusticia geri  
non

DE IVRE BELLI.

non posse, nihilq; tam inimicum quàm iniusticiam ciuitati, a Lælio (quem Cicero de repub. disputantem contra Philum inducit) abudè satis disceptatum sit: tamen bellum sine iniuria geri nõ posse, adhuc hodie multorũ mentibus insedit. tot enim mala, tam magna, tam horrèda, tam sæua, ex bellis, etiam quæ iusta dicuntur, & quidem necessariò oriri: vt qui illa omnia ad iusticiæ normam redigere conetur, nihil aliud agat, quàm si cum ratione insaniat. Etenim profus inutilem esse iusticiam: & id ius esse in bello, quod ei, qui plus potest, vrile est: & pro iure vires esse: hoc potissimum argumento probare nitebãtur veteres, iniustum scilicet esse, & contra naturam, vt homines hominibus dominantibus seruiant: quod belli iure inductum fuit: quam tamen iniusticiam nisi sequatur imperiosa ciuitas, cuius magna est resp. non eam posse prouinciis imperare. Sed certè tollenda est hæc opinio, sunt enim & belli, sicut & pacis iura: & in eos, qui equum pati non possunt, nec ratione cohiberi, vis haud iniusta est. Iniquitas enim partis aduersæ, vt inquit D. Augustinus, iusta bella ingerit gerenda sapièti,  
imo

*de ciuit. Del  
hb. 19. cap. 7.*

PRÆFATIO

imo necessaria. Itaque Dauid vir Deo acceptissimus, aliiq; viri sanctissimi, bella gesserunt<sup>a</sup>. & Deus ipse præcepit Israëlitis, vt Amorrhæis, aliisque populis bella inferrent. Dolebit ergo sapiens, iusti belli sibi extitisse necessitatem: suscipiet tamen, communi reipub. vtilitati consulens potius quàm priuatorum: ne cōtra præceptum illud Platonis, dum partem aliquam reipub. tueri vult, totum corpus dēferat. Nec protinus iniustum censendum est, quòd iusto bello victi, in seruitutem olim redigerentur: imo id iustissimum esse, ex eo defendi potest, quòd reipub. conueniat, vt puniantur ij, qui iniustum bellum gerunt. sed & quod talibus hominibus sit vtilis seruitus, dici potest: quia scilicet improbis aufertur iniuriarū licētia, & domiti se melius habituri sunt, quàm indomiti se habuerūt. quales Asiæ incolas esse, Agesilaus dicere solet, bonos scilicet, si seruirēt, malos, si libertate fruerentur. Quæ ratio vt firmaretur, Lælius apud Ciceronem de republ. disputans, subdidit veluti a natura sumptū nobile exemplum, & dixit: Cur igitur deus homini, animus corpori imperat, ratio libidini, ceterisque vitiosis animi partibus. quod

*c. nol. 23. q. 1*

*Deut. 2.*

*Plut. in apop.*

DE IVRE BELLI.

quod D. Augustino mirè probatur. Sed de civit. Dei  
lib. 19. cap. 7.  
& ex præcepto Dei Moyfes, Madianitis  
prælio victis, prædam omnem tam ho- nu. 31.  
minum, quàm pecorū inter suos druisit.  
& Apostolus monet seruos, vt obediant ad Ephes. 6.  
dominis suis, & ex animo seruiant. Recta  
itaq; ratio natura sapiētibus insita, coër-  
cendam humanam improbitatem, bello,  
captiuitate, & seruitute suasit. de quo a-  
lio loco plura dicemus. Porrò eadem  
ratio iusticiæ, quæ bellis gerendis nor-  
mam præscribit, dat etiam suas leges mi-  
litaribus & exercitui, quibus disciplina mi-  
litaris stabilitur: qua semel polluta, vt  
» Papyrij dictatoris verba apud Liviū re- lib. 8.  
» feram, & non miles cēturionis, non cen-  
» turio tribuni, non tribunus legati, non  
» legatus consulis, non magister equitum  
» dictatoris pareat imperio: nō edicta im-  
» peratoris obseruentur; sine comteatu  
» vagi milites, in pacato, in hostico errent,  
» immemores sacramenti, licentia sola se  
» vbi velint exauctorent: infrequentia de-  
» ferantur signa: neque conueniatur ad e-  
» dictum, nec discernatur interdium, nocte;  
» æquo, iniquo loco; iniussu imperatoris  
» pugnent, & non signa, non ordines ser-  
» uent, latrocinij modo cæca & fortuita,  
pro

**PRÆFATIO DE IVRE BELLI.**  
pro solenni & sacra militia erit. Ut enim  
in fidibus & cantu, ex distinctis fonis, &  
dissimillarū vocum moderatione, cō-  
cors tamen concentus efficitur & con-  
gruens: sic ex summis, & mediis, & infi-  
mis interiectis ordinibus, moderatum  
ratione & disciplina exercitū (quod de  
ciuitate dicebat Scipio, quem Cicero de  
republ. disputantem inducit) consensu  
dissimillimorum concinere dicendū est.  
& quæ harmonia a Musicis dicitur in cā-  
tu, ea est in exercitu concordia, arctissi-  
mum & optimū disciplinæ militaris vin-  
culum: quæ certè sine iusticia esse non  
potest: quæ ad quamcunque rem geren-  
dam est necessaria: & cuius, ut ait Cicero,  
tanta vis est, ut nec illi quidem, qui male-  
ficio & scelere pascuntur, possint sine vlla  
particula iusticiæ viuere. Et hæc quidem  
dixisse sufficiat, ut huius operis rationem  
redderemus, & iis satisfaceremus, qui iu-  
ra belli (quibus reip. salus continetur)  
tanquam naturæ & paci euangelicæ  
contraria, damnare sunt  
ausi.

**LIBRI**

LIBRI PRIMI CAPITA.

|                                                                                                              |         |
|--------------------------------------------------------------------------------------------------------------|---------|
| <b>D</b> E ratione belli indicendi, aliisque caerimonjiis bellicis, quæ antiquo iure feziali prodita: fuere. | Cap. 1. |
| De bello iusto, & iustis belli caufis.                                                                       | Cap. 2. |
| De duello feu fingulari certamine,                                                                           | Cap. 3. |
| De pignerationibus, quas vulgò re prefalias vocât.                                                           | Cap. 4. |
| De bello captis, & iure postliminij.                                                                         | Cap. 5. |
| De fide hosti feruanda.                                                                                      | Cap. 6. |
| De foederibus & induciis.                                                                                    | Cap. 7. |
| De infidiis & fraude hostili.                                                                                | Cap. 8. |
| De iure legatorum.                                                                                           | Cap. 9. |

*Libri fecundi capitâ.*

|                                                                                                                                                                                    |          |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| <b>D</b> E officiis bellicis.                                                                                                                                                      | Cap. 1.  |
| De imperatore vel duce exercitus.                                                                                                                                                  | Cap. 2.  |
| Vnum non plures exercitui præfici debere, & cum potestate libera: eundemque continuum: nec eum quem prius offenderis ignominia:ue affeceris.                                       | Cap. 3.  |
| Vtrum lenitate & beneuolentia, an verò feueritate & sæuitia plus proficiet imperator.                                                                                              | Cap. 4.  |
| Temporum rationem præcipuè in bello habendâ.                                                                                                                                       | Cap. 5.  |
| Contentiofas & lentas de rebus bellicis deliberationes admodum noxias esse, præfertim vbi factò magis quàm confulto opus est.                                                      | Cap. 6.  |
| Dum res adhuc sunt integræ, ne minimum quidem regi vel reip. de maiestate fua concedendum esse: & errare eos qui arrogantiam hostium; modestia & patientia vinci poffe existimant. | Cap. 7.  |
| An præfter bellum domi excipere, an verò in hostilem agrum inferre.                                                                                                                | Cap. 8.  |
| An præftet initio prælij magno clamore & cõcitato cursu in hostes pergere, an verò loco manere & hostium impetum excipere.                                                         | Cap. 9.  |
| Non esse consilij inuicem infensos ciuilibus dissentionibus hostes sola discordia fretum inuadere.                                                                                 | Cap. 10. |
| Necessitatem pugnandi magno studio imponendam esse militibus & hostibus remittendam.                                                                                               | Cap. 11. |
| In victoria potissimum de pace cogirandum.                                                                                                                                         | Cap. 12. |
| Deiustis hostibus, qua potissimum ratione perpetua pace quieti obtineri possint.                                                                                                   | Cap. 13. |

*Libri*

## INDEX CAPITVM.

*Libri tertij capita.*

|                                                                                          |          |
|------------------------------------------------------------------------------------------|----------|
| <b>D</b> E disciplina militari.                                                          | Cap. 1.  |
| De officio legati, tribuni, & aliorum qui militibus præfunt.                             | Cap. 2.  |
| De metatoribus, siue menforibus.                                                         | Cap. 3.  |
| De militibus, & qui militare possunt.                                                    | Cap. 4.  |
| De sacramento militari.                                                                  | Cap. 5.  |
| De missione.                                                                             | Cap. 6.  |
| De priuilegijs militum.                                                                  | Cap. 7.  |
| De iudicijs militaribus.                                                                 | Cap. 8.  |
| De pœnis militum.                                                                        | Cap. 9.  |
| De contumacibus & ducum dicto non parentibus, eosque non protegentibus.                  | Cap. 10. |
| De emanforibus.                                                                          | Cap. 11. |
| De defertoribus.                                                                         | Cap. 12. |
| De transfugis & proditoribus.                                                            | Cap. 13. |
| De seditionis.                                                                           | Cap. 14. |
| De iis qui in acie loco cedunt aut victi se dedunt.                                      | Cap. 15. |
| De iis qui arma alienant, vel amittunt.                                                  | Cap. 16. |
| De iis qui excubias deferunt, vel minus recte agunt.                                     | Cap. 17. |
| De eo qui arcem, vel oppidum, cuius præsidio impositus est, amittit, vel hostibus dedit. | Cap. 18. |
| De furtis & alijs quibusdam delictis militaribus.                                        | Cap. 19. |
| De præmijs militum.                                                                      | Cap. 20. |

*Tres hi libri utiles sunt ad conseruandam hoc tempore calamitosa disciplinam militarem, nec habent aliquid quod fidei Catholice contrarietur. Sic censio 16. Nouemb. 1581.*

Mathias Lambrecht sacre Theol.  
Licent. & Regius in alma vniuers.  
Duacen. Catechismi professor.

DE IV-

I

# DE IVRE ET OFFICIIS BELLICIS, ET DISCIPLINA MILITARI, LIBER PRIMVS.

DE RATIONE BELLII INDICENDI,  
ALIISQVE CÆRIMONIIS BELLICIS,  
quæ antiquo iure feziali proditæ fuerunt.

- 1 *Ius feziale.*
- 2 *Collegium fezialium.*
- 3 *Officium fezialium.*
- 4 *Clarigatio.*
- 5 *Paterpatratus.*
- 6 *Tybarenorum fides.*
- 7 *Verba iuris fezialis.*
- 8 *Iniuſſu populi fædus iniri non poterat.*
- 9 *Sp Postumus hoſtibus deditus.*
- 10 *Deditionis formula.*
- 11 *Mancinus Numantinis deditus.*

## CAPVT PRIMVM.



ROMANOS belli, ſicut & pa-  
cis iura perpenſo iudicio  
ſemper æſtimaffe, ex eo-  
rũ historiis licet cognof-  
cere: ita vt mirum videri  
non debeat, tam felices eis ſemper con-  
tigiffe bellorũ exitus: quippe qui arma  
A nunquam

DE IVRE ET OFF. BELL.

nunquam nisi iustis de causis sumpse-  
rint, vt refert Dionysius Halicarnass.<sup>a</sup>  
vsque adeò vt cùm legati Campanorū  
(quos Samnites aduerso prælio frege-  
rant, & ad petendum Romæ auxilium  
coëgerant) in senatum introducti, mul-  
tis verbis docuissent, quam utilis foret  
Rom. rebus Cāpanæ societatis accessio,  
petentes amicitiam in perpetuū, in præ-  
sens auxilium: nihil tamen aliud impe-  
trarunt à senatu, qui non temerè se bel-  
lis alienis immiscere volebat, quàm vt  
legati mitterentur ad Samnites, precatū  
ne qua vis Campanis fieret. ad que prin-  
ceps legationis à Cāpanis missus, quē-  
admodum in mādatis acceperat, Quan-  
doquidem, inquit, nostra tueri aduersus  
vim atque iniuriam iusta vi non vultis,  
vestra certè defendetis. itaq; populum  
Campanum, vrbēque Capuam, agros,  
diuina, humanaque omnia in vestram  
P. C. populi que Rom. ditionem dedi-  
mus. quicquid deinde patiemur dediti-  
tij vestri passuri. Tum in senatu iam fi-  
desagi visa, vt refert Liuius,<sup>b</sup> dediros nō  
prodi, bellumque aduersus Samnites  
susceptū est, quod sine iusto titulo, Ro-  
mani à Campanis in se nunquam ver-  
tissent.

<sup>a</sup> Antiquitat.  
Roma. lib. 2.

<sup>b</sup> lib. 7.

tissent. Similiter priusquam tertium & ultimum bellum Punicū susciperetur, diu multumque tāta res agitata est; atque inter M. Porcium Catonem, & Scipionem Nasicam senatus principes (quorū alter sapientissimus vir in ciuitate habebatur, alter optimus vir etiam à senatu iudicatus erat) variis sententiis certatū. Cato suadebat vt bellum indiceretur Carthaginēsis, qui exercitum specie contra Massanissā regem; re ipsa, cōtra Romanos cōparatum in finibus habebant, Nastica cōtradicente, ex cuius sententia legatos mitti Carthaginem placuit, qui specularentur quid agerent, castigato eorum senatu, quòd contra fœdus exercitum, & nauales materias haberent. Sed Gisgo Amilcaris filius, homo seditiosus, ita senatum bellum aduersus Romanos suadendo concitauit, vt legati fuga sibi consulere coacti sint. cumque tunc Cato non diutius bellum differendum censeret, Nastica nondum iustam sibi beilandī causam videri, & nihil temerè faciendum dicebat. sed Catonis sententia peruicit, & cum Carthaginensibus, quòd contra fœdus naues haberent, & extra finēs exercitum

DE IVRE ET OFF. BELL.

eduxissent, quodque Massanissæ socio  
 a *Flor. lib. 49* arma intulissent, bellum gestum<sup>a</sup>. Ac  
 belli quidem æquitas, ut inquit Cice-  
 b *offc lib. 1.* ro<sup>b</sup>, sanctissimè \* feciali populi Roma-  
 ni iure perscripta erat. ex quo intel-  
 ligi potest, nullum bellum fuisse iu-  
 stum, nisi quod aut rebus repetitis ge-  
 reretur, aut denūciatum antè esset, aut  
 indictum. quod ius Ancus Martius rex,  
 ab antiqua gēte Æquiculis descripsit. a  
 quo bellicæ cærimoniæ, ut non gererē-  
 tur solum, sed etiam indicerentur bella  
 aliquo ritu, primùm Romanis, uti Li-  
 c *lib. 1.* uivius<sup>c</sup> testatur, sunt proditæ: licet alij hoc  
 Numæ Pompilio tribuant, a quo septi-  
 ma sacrarum legum parte, collegium  
 d *Dionysius* fecialium \* institutum fuisse asserunt<sup>d</sup>. 2  
*Haliscar. an-* Officiū \* verò fecialiū (cuius summa 3  
*tiquit. Rom.* semper apud Romanos fuit auctoritas)  
*lib. 2.* in summa erat: dare operam ne Romani  
 ulli fœderatæ ciuitati, iniustum bellum  
 inferrēt; & de bellis, fœderibus, pactio-  
 nibus, & iniuriis, fociis, aliisque confœ-  
 deratis gētibus illatis cognoscere. quòd  
 si qua prior, contra fœderis cōditiones,  
 aliquid commisisset, legatos mittere, &  
 verbis primùm ius suum repetere, & res  
 sibi dari clara voce postulare (quæ clari-  
 gatio

4 gatio \* dicta) his verbis : Iouem ego te-  
 „ stem facio, si ego impiè iniuste que, illas  
 „ res dedier populo Romano, mihi que  
 „ exposco, tunc patriæ compotem nun-  
 „ quam sinas esse. Quòd si dedignaretur  
 „ facere postulata, renūciata prius socie-  
 „ tate & amicitia (si qua fortè erat) post  
 „ triginta demum dies, qui solènes fuère,  
 „ bellum indicere, captaq; , & hostili mo-  
 „ do deuastata, belli iure repetere. Fecia-  
 „ libus certè prohibentibus, aut non pro-  
 „ bantibus, neque consuli, neque senatui,  
 „ neq; populo, arma in hostes sumere li-  
 5 cebat. Maximus \* verò erat inter fecia-  
 „ les, quem Patrempatratum appellabāt.  
 „ is autem erat, qui liberos haberet, uiuo  
 „ adhuc patre suo <sup>a</sup>, què fecialis, verbena  
 „ caput & frontem cingens, indicēdi bel-  
 „ li, aut percutiendi foederis, principem  
 „ faciebat. Cæterum sciendum est non  
 „ fuisse necesse, ipsi regi, cum quo fortè  
 „ belligerandum erat, bellum indici, sed  
 „ satis erat, ad præsidium aliquod nun-  
 „ ciare. vt feciales consulti, primùm cùm  
 „ Philippo, & iterum cùm Antiocho bel-  
 „ lum indicendum esset, decreuere. Bel-  
 „ lo autem legitimè indicto, sublatis cō-  
 „ mertiis, militi arma capere, & copias

<sup>a</sup> Plut. in  
 quæst. Romæ.

DE IVRE ET OFF. BELL.

cogere licebat, ad hostes ducere, excursions facere, prædas agere, fines populari, eosque ferro, ignique; deuastare, frumenta succidere, ædificia incendere, atque omnia hostiliter agere. Tybarenos \* tamé adeo iustos fuisse memoriæ proditum est, vt non prius cum hoste congregerentur, quàm diem, locum, & decretâdi horam, ex fide per feciales hosti denunciarent. quod & à veteribus illis Romanis, nōnunquam factum fuisse legimus. Formulam verò, & ritum belli indicēdi, antiquissimum refert Lilius<sup>a</sup>. Feciales itaque, si qui illatam cōtra fœdus iniuriâ querebantur, causam eorum cognoscebant, & cōperto crimine, fontes comprehensos læsis dedebant. iudicabant item de legatorum iniuriis, qui iure gentium sancti fuère: atque ita, si à quouis populo, aut natione violati forent, vt hi qui iura gentium temerè violassent, dederentur, per feciales cauebatur. idque etiam iure nostro cautum est<sup>b</sup>. Dabant quoque operam feciales, vt seruarietur cōditiones fœderis, pacem faciebant, & si parum legitimè facta videbatur, irritam reddebant. Non aliter tamen fœdera cum sociis, aut hostibus sancire,

<sup>a</sup> Lib. 1. Et  
Cell. lib. 16.  
cap. 4. Et  
Dion. Halic.  
car. Ant. Ro-  
ma, lib. 2.

<sup>b</sup> In l. vlt. D.  
delegationib.

fancire, aut pactiones concipere poterant, quàm si cōsulis, aut prætoris auctoritate, intercedente S. C. iussuq; populi, permillum foret, denique si quid imperatores, vel duces contra iurisiurâdi religionem peccassent, feciales cognoscebant, atque expiabant. Verba<sup>\*</sup> autem  
 „ iuris feccialis hæc erant : Belli, pacis, fœderum, indutiæ, oratorum, fecciales iudices sunt<sup>a</sup>. Et quidem auctores fœderis, minus rite initi, per ipsos fecciales hostibus dedebatur, vt hac ratione, populus religione solueretur. Iniussu<sup>\*</sup> verò populi & citra Senatus auctoritatē, nihil fanciri poterat, quod populum teneret, & sine feccialibus, cærimoniaque alia solemoni, fœdus fieri non poterat. Vnde T. Veturius, & Sp. Postumius  
 9 confs.<sup>\*</sup> quia, cùm malè pugnatum apud Caudiū esset, legionibus Romanis subiugum missis, pacem cum Samnitibus iniussu populi, senatusque fecerant, vnâ cum T. Numicio & Q. Æmilio Trib. pleb. quod eorū quoq; auctoritate pax Caudina facta erat, dediti sunt hostibus, vt pax Samnitum repudiaretur. atque huius deditiois ipse Postumius, qui dedebatur, suasor & auctor fuit<sup>b</sup>.

<sup>a</sup> Cicer. lib. 2  
de legib.

DE IVRE ET OFF. BELL.

Cuius verba, vt refert Liuius, hæc fuerunt : Dedamur per feciales, nudi vinctique, exoluamus religione populum, si qua obligauimus : ne quid diuini, humanive obstet, quo minus iustū piūque de integro ineatur bellum. Deditio-  
 tionis vero per feciales factæ formula hæc fuit \* : Quandoquidem hinc homines iniussu populi Romani, quiritum  
 fœdus ictum iri spopoderunt, atque ob eam rem noxam nocuerunt : ob eam  
 rē, quò populus Romanus scelere impio sit solutus, hosce homines vobis dedo . Similiter multis annis post \* C. II  
 Mancinus Numantinis, quibuscum iniussu populi & citra senatus auctoritatem fœdus fecerat, deditus est <sup>b</sup>.

<sup>a</sup> Cicero of-  
 fic. lib. 3.  
 Flor. lib. 2.  
 cap. 18.

DE BELLO IUSTO ET IUSTIS  
 BELLII CAUSIS.

- 1 *Conseruanda iura belli.*
- 2 *Duo genera decertandi.*
- 3 *Bella suscipienda, vt in pace vinatur.*
- 4 *Ex bellis etiam iustis multa mala oriri.*
- 5 *Bellum honestum turpi paci præferendum.*
- 6 *Iusta bella iure Gentium, Canonum, & diuino permissa.*

LIBER PRIMVS.

5

- 7 *In iusto bello requiritur auctoritas Principis.*
- 8 *Apud Romanos belli pacisque arbitrium penes populum fuit.*
- 9 *Quandoque iniussu principis bellum geri posse.*
- 10 *In pœnam rebellionis ipso iure inciditur.*
- 11 *Iusta belli causa.*
- 12 *Rebellio.*
- 13 *Iniuria facta principi, cœsetur facta Deo.*
- 14 *Aliud rebellis; aliud hostis.*
- 15 *Iura belli an conueniant rebellibus.*
- 16 *Ciuilis dissentio.*
- 17 *Lex Solonis.*
- 18 *In bello non semper tutum non alteri parti se adiungere.*
- 19 *Media via periculosa.*
- 20 *Principis auctoritas semper sequenda contra rebelles.*
- 21 *Nulla iusta causa rebellandi.*
- 22 *Quid respub. vel patria.*
- 23 *Rebellio grauissimum crimen.*
- 24 *Tyrannus occidi potest.*
- 25 *Legitimus princeps tyrannus dici non potest.*
- 26 *Lex Regia.*
- 27 *Pontifex ex causa potest regem regno priuare.*

DE IVRE ET OFF. BELL.

- 28 *Bellum aduersus infideles an, & quatenus iustum.*
- 29 *Imperator non est totius mūdi dominus.*
- 30 *Hæreticis iustum bellum infertur.*
- 31 *Militi non nocet iniusta belli causa.*
- 32 *Militi Christiano sub imperatore pagano permissum militare.*
- 33 *Quatenus regi infideli parendum.*
- 34 *Iustum bellum etiam sine iusta causa.*
- 35 *An utrimque bellum dici possit iustum.*
- 36 *Pecunia neruus belli.*
- 37 *Cuius impensis bellum geri debeat.*
- 38 *Traianus fiscum lœni comparabat.*
- 39 *Mos Gallorum.*
- 40 *Damnain bello accepta an resarciri debeant.*

CAPVT SECVNDVM.

**I**N repub. bene constituta maximè cō-  
a offic. lib. 1. seruanda\* esse iura belli docet Cicer.<sup>a</sup> 1  
in quo & suscipiendo, & gerendo, & de-  
ponendo ius vt plurimum valet & fi-  
b Cicer. lib. 2 de legibus. des<sup>b</sup>. quò spectāt illa, quæ de iure feciali  
diximus. Nam cū sint duo\* genera de- 2  
certandi, vt idem ait : vnum per discep-  
tationem, alterum per vim: cumq; illud  
propriū sit hominis, hoc belluarū;  
confugiendum est ad posterius, si vti nō  
licet

licet superiore. Quod etiã indicasse videntur poëtæ, cùm Chironem centaurum (cuius superiorem partē hominis, inferiorem verò equi formã referre fingunt) Achillis pædagogum cõstitutum tradunt: vt ostenderent, bonum principem non solùm prudentia & consilio, aliisque animi dotibus præditum, sed etiam viribus, & armis instructum esse debere. in eos enim qui æquum pati nõ possunt, neq; ratione cohiberi, vis haud iniusta est. Sed vt Scipio dicere solet, imperator itidẽ vt medicus, ad malum curandum vltimo demum loco ferrum

3 adhibere debet <sup>a</sup>. Quare suscipienda <sup>a</sup> a Plut. in A-  
poph. quidem bella sunt, ob eam causam vt sine iniuria in pace viuatur, & ita vt nihil aliud nisi pax quæsitã videatur <sup>b</sup>. Quò <sup>b</sup> c. voli. 23  
quest. 1. spectat memorabilis illa Martiani Cæsaris sententia: Donec liceret in pace viuere, nõ debere principẽ arma sumere:

4 cùm tot tantaque mala ex bellis <sup>c</sup>, etiam quæ iusta dicuntur, oriantur. quorum

» malorum, vt exclamat D. Augustinus <sup>c</sup>, c de ciuit. Dei  
lib. 19. cap. 7

» multas & multiplices clades, diras &

» duras necessitates, si, vt dignũ est, eloqui

» velim, quanquam nequaquam sicut res

» postulat, possim; quis erit prolixę disputationis

DE IVRE ET OFF. BELL.

tationis modus? Sed sapiens, inquit, iusta bella gesturus est: quasi nō, si se hominem meminit, multo magis dolebit iustorum necessitates sibi extitisse bellorum. quia nisi iusta essent, gerenda nō essent, ac per hoc sapienti nulla bella essent. iniquitas enim partis aduersæ iusta bella ingerit gerenda sapiēti, imo & necessaria, quæ iniquitas homini utique dolēda, quia hominum est, etsi nulla ex ea bellandi necessitas nasceretur. Hæc itaque mala tam magna, tam horrenda, tam sæua quisquis cum dolore considerat, miseriam necesse est fateatur. quisquis autem vel patitur ea sine animi dolore, vel cogitat, multo ubique miserius ideo se putat beatum, quia & humanū perdit sensum: hæc ille. Sunt enim, ut inquit Liuius, quædā belli iura, quæ ut facere, ita pati fas est: ut fata exuri, dirui tecta, prædas hominum pecorumq; agi: quæ certè misera, licet non semper indigna, patienti sunt. Paci itaque, quæ nihil sit habitura insidiarū, aut turpitudinis, ut ait Cicero<sup>a</sup>, semper erit cōsulendum. Cererum, quāuis, ut idem ait<sup>b</sup>, dulce sit nomen pacis, & ipsa res tum iucunda, tum salutaris. nam neq; priuatos focos, neque

<sup>a</sup> officio. lib. 1

<sup>b</sup> Philipp. 13

neque publicas leges, neque libertatis iura chara habere potest, quæ discordiæ, quem cædes ciuium, quem bellum publicum delectat: bellum tamen \* honestū, ex Demosthenis sententia, turpi paci semper est præferendum. Et quidem

6 iusta \* bella sunt iure gentium indicta a: & tum iure canonum<sup>b</sup>: tum etiam iure diuino permessa<sup>c</sup>. nā & Deus ipse præcepit Israelitis, vt Amorrhæis, aliisq; populis bellum inferrent<sup>d</sup>. vnde D. August.<sup>e</sup> Noli, inquit, existimare neminem Deo placere, qui armis bellicis ministrat. nam Dauid Deo acceptissimus, & Centurio ille, cuius fides diuino testimonio extollitur, & alij sancti viri operam militiæ dederunt. Vt autem bellum

7 dicatur iustum, debet imprimis \* auctoritate, & mandato summi principis, penes quem est belli pacisq; arbitrium, indici, & suscipi<sup>f</sup>. Nam ad priuatum non spectat bellum mouere, cum ius suū in iudicio persequi possit & debeat. violat enim ius principis, qui sine iuris auctoritate, manu regia ius sibi dicit<sup>g</sup>. Sed nec vlli, in scio, & inconsulto principe, quorumlibet armorum mouendorum copia tribuitur<sup>h</sup>. Et lege Iulia maiestatis te-

a L. ex hoc iure. ff. de iust & iur.  
b c. in su. c. Dominus. 23 quaest. 2. Inno. in c. olim. de ressit. spol. c. c. nise bella. c. noli. c. militare. 23. q. 1. c. notandum. 23 quaest. 2. d Deuter. 2. e epist. 1. ad Bonifacio.

f c. quid culpatur. 23. q. 1. D. Augustin. lib. 22. contra Faust. ca. 74. g L. exstat. D. de eo quod met. caus. h l. vnc. C. vt armo. v. sus iusc. princip si interdict. lib. 11.

DE IVRE ET OFF. BELL.

tis tenetur, qui iniussu principis bellum gesserit, delectumve habuerit, aut exercitum comparauerit<sup>a</sup>. Itaque Cato cen-

<sup>a</sup> L. 3. D. ad legem Iul. maies.

sebat reuocandum exercitum, & Cæsarem hostibus dedendum, quod iniussu

<sup>b</sup> Plutar. in Cat. Vticen. & Iul. Cæsar

populi bellū in Gallia gereret<sup>b</sup>. Apud

Romanos<sup>\*</sup> enim penes populum, cuius

<sup>c</sup> Livijs l. 4.

erat summum imperium, belli pacisque arbitriū fuit, vt ex multis Livijs locis factis constat. Itaque patres decreuere, in-

quit Livijs<sup>c</sup>, vt tribuni militum de bello indicendo Veiētibus, primo quoque

<sup>d</sup> Livijs lib. 16.

die ad populum ferrent. item Prænestinis ex S. C. populi iussu, bellum indictū

est<sup>d</sup>: & ex auctoritate patrum populus Palæpolitani bellum fieri iussit: item

<sup>e</sup> Livijs lib. 18.

Vestinis<sup>e</sup>, & Æquis<sup>f</sup>. Vnde cum populus omne imperium in se, potestatem-

<sup>f</sup> Livijs lib. 19.

que, principi lege Regia cōtulerit<sup>g</sup>, hoc belli, pacisque; arbitrium est apud solum

<sup>g</sup> l. 1. D. de constit. princ.

principem: quod ita penes ipsum residet, & maiestati principis cohæret, vt ab

<sup>h</sup> Latè Bodin. de repub. lib. 1. ca. vlt.

eo diuelli non possit<sup>h</sup>. & hoc ius reges semper habuisse, indicat quoque histo-

<sup>i</sup> Reg. 1. c. 8.

ria sacra<sup>i</sup>. Nonnunquam tamen<sup>\*</sup>, vt puta

ex magna & necessaria causa, & si princeps sit absens, sitque periculū in mora, etiam iniussu principis bellum geri poterit:

9

terit<sup>a</sup>: præsertim ex causa defensionis,  
 quæ iure naturæ cuilibet conceditur<sup>b</sup>.  
 Quo casu non solùm licebit propellere  
 iniuriam, sed etiam vlcisci<sup>c</sup>, & hostes se-  
 dibus suis pellere, si aliter ab iis tuti esse  
 non possumus, neque enim dicendus est  
 quis moderamen inculpatæ tutelæ ex-  
 cedere, qui id facit, sine quo periculum  
 euitare non potest: vt multis ostendit  
 Marian. Socin.<sup>d</sup> Nepos, qui existimat  
 istud bellum dici iustum, etiã quoad ef-  
 fectum, & iuri belli locum esse (effectus  
 enim ex causis colligitur<sup>e</sup>.) ideoq; capta  
 in hoc bello, fieri capientium: & hæc  
 multò magis obtinere, si cū rebellibus  
 res sit: quorum conatus non solùm qui-  
 libet potest, sed etiam tenetur cohibere,  
 nō expectato iussu principis, si sit peri-  
 culum in mora. Si enim is, qui non pro-  
 pellit à socio iniuriam, cū potest, tam  
 est in vitio, quàm is qui facit<sup>f</sup>: quid de  
 iniuria, quæ principi fit, dicendum est?  
 10 præsertim\* cū ij, qui quid contra prin-  
 cipis maiestatem, & reipub. quietem ma-  
 chinantur, ipso iure in poenam rebellio-  
 nis incidant<sup>g</sup>, & quasi hostes occidi pos-  
 sint<sup>h</sup>, vel captiui haberi<sup>i</sup>: vnde multò  
 magis bona eorum capientium fient<sup>k</sup>.  
 estque

l. si alius. §.

bellissimè. in

fine. D. quod

vi aut clam.

L. generalis.

C. de decurio.

lib. 10. L. ad

pretor. §. si

debitorem. D.

quæ in fraud.

credit.

b L. vt vim.

D. de iust. &amp;

iur. l. 1. quæd.

lic. vn. sin.

iud. se ven.

Clem. Pasto-

ralis. in fine,

de re iud.

c c. Dominus

23. q. 2.

d Conf. 68.

tomo 3.

e l. 2. §. vlt.

C. l. sequ. D.

de donatio.

fe. nō in infe-

rèda 23. q. 3.

g ex. qui sint

rebell.

h L. 3. §. vlt.

D. ad l. Cor-

nel. de sca. L.

proditores. D.

de re militar.

i L. transfu-

gam. D. de

acq. rer. dom.

k Gloss. ex:

qui sint re-

bell. C. ibi

Bart. &amp; Cur.

Ino. conf. 137

DE IVRE ET OFF. BELL.

estque inter cetera, quæ in Romana historia inuenire licet, præclarum in hanc sententiam exemplum de L. Pinario, Ænnae in Sicilia præfecto præsidij: qui cum ciuium rebellionem, & defectionem ad Carthaginienses præsentiret, & liberum non esset legatos ad Cõsulem Marcellum, quãuis haud procul esset, mittere, ex improviso magna cæde facta, ciues omnes oppressit. quo facinore Ænna retenta est, eiusque factum Marcellus non improbauit, & prædam Ænnesium militibus concessit<sup>a</sup>. Itaque Cicero laudat factum Octauij Cæsaris, qui non expectato senatus decreto, bellum contra Antonium sua sponte susceperat. decernendi enim tempus, vt ille ait, nondum venerat; belli autem gerendi tempus si prætermisisset, videbat repub. oppressa, nihil decerni posse<sup>b</sup>. & senatus quoque bellum priuato consilio à Cæsare susceptum, auctoritate publica comprobauit<sup>c</sup>. Sic quoque, Scipio Nasica maximam laudem meruit, qui priuata auctoritate, se omnibus bonis ducem præbens, Tib. Gracchum cum scelerata factione oppressit<sup>d</sup>. Neesse est enim, vt inquit Cicero, in tanta perturbatione rerum, temporibus

<sup>a</sup> *Liuius lib.*  
34.

<sup>b</sup> *Cic. Phil. 8*

<sup>c</sup> *Cic. Phil. 5*

<sup>d</sup> *Val. Max.*  
*lib. 3. cap. 2.*  
*Appian. de*  
*bell. ciuil. lib.*  
1.

bus potius parere, quàm moribus. & vt idem ait, semper in pace, consuetudini; in bello, vtilitati parendum est. in quam sententiã alio loco plura à nobis dicentur\*. Pręterea bellũ non nisi ex iusta & necessaria causa gerẽdum est a: & abesse debet omnis nocendi cupiditas, vlciscendi crudelitas, & dominandi libido b. quò spectant illa quę iure feciali apud Romanos fuẽre prodita. Neque solũ peccat, qui ex iniusta causa bellum gerit: sed etiam opinione humana passim receptum est, eum fere semper succumbere. Nam, vt inquit Propertius,

*Frangit, & attollit vires in milite causa.*

*Qua nisi iusta subest, excutit arma pudor.*

Iustę verò belli\* causę præcipuę sunt hæ: Defensio proprij imperij, personarum, amicorum, sociorum, & rerum c. ad defensionem enim ipsa lex naturalis etiam priuatıs auctoritatẽ præstat d. Iustum ergo bellum, vt C. Pontius Sannitium dux dicebat, quibus necessariũ, & pia arma, quibus nulla nisi in armis spes relinquitur. Subest quoque iusta belli causa, cùm geritur ad recuperandas res, quę per vim & iniustẽ ab hostibus detinentur e: vel vt iniurię, vel dāni

B illati

\* l. 2. cap. 5.

a c. noli. 23.

q<sup>o</sup> 1.

b c. quid cul-  
patur. 23. q. 2.

c c. iustum.

23. quest. 2.

c. fortitudo.

cum duob. se-

quen. 23. c. o-

lim. et ibi In-

no. de restit.

spol.

d l. vt vim.

D. de iust. &

iur. l. furem.

D. ad l. Cor-

nel de fide. l.

itaque. D. ad

l. Aquil.

e c. iustum.

23. quest. 2.

D. Augustin.

quest. 10. su-

per Iosue li. 2

DE IVRE ET OFF. BELL.

illati auctores dedantur ad supplicium, si fortè non publico, sed privato cõsilio iniuria illata fuerit<sup>a</sup>. quod etiã iure fe-  
ciali cautum fuisse superius ostẽdimus. Itaque Daud, mortuo Saule, bellum  
gessit cum Isbofeth, filio Saulis, qui oc-  
cupare nitebatur regnum Israël, quod  
Dominus per Samuelem prophetã tra-  
diderat Daudi<sup>b</sup>. & Romulus Albanis  
bellũ intulit, quòd dictator eorũ Clui-  
lius, nollet res raptas restituere, neque  
raptores tradere<sup>c</sup>. Est præterea iusta bel-  
li causa, vindicta iniuriæ iniquissimè il-  
lata<sup>d</sup>. Sic legimus Dauidem regem in-  
tulisse bellum regi Ammonitarum, pro-  
pter derisos legatos suos<sup>e</sup>. Et quidem  
ratione iniurię illatæ, dicitur etiam bel-  
lum iustum, si quis prohibeatur transire  
per alicuius prouinciam. modò trãsitus  
innoxius futurus sit : qui iure humanæ  
societatis patere debet<sup>f</sup>. Itaque Israëlitę  
bellũ intulerunt regibus Amorrhæorum,  
propter non concessum transitũ inno-  
xium, in terrã ipsis a Deo permissam<sup>g</sup>.  
Iustissimam<sup>\*</sup> deniq; belli causam habet<sup>12</sup>  
princeps, qui armis persequitur rebel-  
les, & ab imperio deficientes<sup>h</sup>. grauis e-  
nim iniuria infertur Deo, & principi,  
cũ

a c. 1. de in-  
iur. 76. cap.  
Dominus, 23  
quæst. 2.

b Reg. 2. c. 2

c Dionys  
Halic. lib. 3.

d c. Dominus  
23. quæst. 2.  
cap. dispar.  
23. quæst. 8.

e Reg. 2. cap.  
20. cu duob.  
sequ.

f c. ult. 23.  
quæst. 2.

g Num. 2.  
h c. auctori-  
tate. 15. q. 6.  
cap. scire vos.  
23. qu. 8. fac.  
l. amissione.  
§. qui defi-  
ciunt. D. de  
capit. munit.

cùm eius imperio subditi resistunt, non est enim potestas, nisi a Deo : & qui resistit potestati, vt inquit Paulus<sup>a</sup>, Dei ordinationi resistit : & iniuria \* facta principi, cęsetur facta Deo: qui Samueli, a quo populus alium regem petebat, dixit : Non te abiecerunt, sed me, ne regnem super eos<sup>b</sup>. Dauid autem bellum gessit cum Seba filio Bochri, qui populum sollicitauit, vt a Dauide ad ipsum deficeret<sup>c</sup>. Sed cùm rebellis \* proprię hostis dici non possit, (nam aliud est hostis, aliud rebellis<sup>d</sup>) verius est, vt si cū subditis rebellibus armis certetur, non tam dicamus esse bellum, quàm executionem iurisdictionis, & persecutionem rebellium<sup>e</sup>. Vnde etiam non erit opus auctoritate summi principis, sed sufficiet eius qui iurisdictione habet<sup>f</sup>. Hinc iura belli \*, captiuitatis, & postliminij, quę hostibus tantùm cōueniunt<sup>g</sup>, non posse rebellibus cōuenire, consequēs videntur : sicut nec piratis & latronibus (qui hostium numero non cōtinentur) conueniūt<sup>h</sup>. quod ita intelligi debet, vt ipsi iure belli agere non possint : ideoq; dominium rerū captarum non acquirūt<sup>i</sup>, quod hostibus tantùm tributum est<sup>k</sup>. in

<sup>a</sup> ad Roman.  
<sup>cap.</sup> 13.

<sup>b</sup> Reg. 1. c. 3.

<sup>c</sup> Reg. 2. c. 20.

<sup>d</sup> ex. qui sunt  
rebellis. l. ho-  
stes D. de ca-  
ptiuit. hostes.  
D. de verbor.  
significat.

<sup>e</sup> inno. inc.  
olim. 1. de re-  
spon. solbat.  
fac. l. qui re-  
stituere. D. de  
res vendic.

<sup>f</sup> d. . . qui re-  
stituere.

<sup>g</sup> l. post imi-  
nium. et deo 8. 8.

<sup>h</sup> D. de captiuit.  
D. l. ho:tes.

<sup>i</sup> L. post imi-  
nium. §. à pi-  
ratis. D. de  
captiuit. l. a  
latronib. D.  
de testam. l.  
hostes.

<sup>k</sup> D. l. postli-  
minij.

DE IVRE ET OFF. BELL.

ipfos verò iure belli scire, multoque magis quam in hostes, licet: sunt enim odio digni maiore, & non debet esse melioris conditionis rebellis & latro, quam legitimus & iustus hostis<sup>a</sup>. Quò spectare videtur quod bCicero sentit, non esse mittendos legatos ad Antonium, nec verbis rogandum, sed cogendum armis esse recedere ab obsidione Mutinæ, coloniarum populi Rom. & oppugnatione Bruti imperatoris, consulis designati, & civis optimi. non enim cum Annibale rem esse hoste reipub. ad quem senatus olim legatos miserat, ut à Sagunto recederet, sed cum ciue. Neque interesse dicebat, utrum urbem Romanam Antonius oppugnaret, an coloniam populi Rom. præsidij causa collocatam. & alibi idem Cicero ad Plancum scribens c dicit, cum Antonianis, à quibus Brutus Mutinæ obsidebatur, pacem fieri non debere: vocans eos sceleratissimos latrones, qui aut armis positis pacem petere deberent: aut, si pugnantes eam postularent, victoria pacem, non pactione pariendam esse. Præterea cum à parte principis sint omnia illa, quæ ad iustum bellum sunt necessaria: nempe belli gerendi ius, & iusta belli

a Argumēto  
l. 3. §. 1. D.  
de donat. in-  
ter vir. et vir.  
b Philipp. 5.

c epist. 6. lib.  
10.

belli causa; à parte verò rebellium, neq; belli gerēdi ius, quod soli principi competit, vt superius ostēdimus, neque iusta belli causa: cū nulla sit causa rebellandi, vt mox dicemus: sequitur bellum, quod cum rebellibus princeps gerit, iustissimum esse: ideoq; iuri belli locum esse contra rebelles, qui tanquam hostes occidi possunt<sup>a</sup>, vel capti serui haberi<sup>b</sup>, vnde etiam multò magis bona eorum prædæ cedent<sup>c</sup>. effectus enim ex causis colligitur<sup>d</sup>. Quod ita verum puto, si auspiciis summi principis bellum geratur, alioqui verò, quamuis defensio cui libet permessa sit, & quisque iurisdictionem suam exercere possit, tamen iura belli non aliter locum habebunt, quàm si auctoritatē, & nomine summi principis bellum geratur<sup>e</sup>. alias enim bellum dici non potest. Bellum verò quod rebelles gerunt, iniustissimum esse cōstat: ideoq; iure belli agere non possunt, & capti ab ipsis non fiunt serui<sup>f</sup>. nam cessante causa cessat effectus<sup>g</sup>; & nemo ex dolo suo lucrari, aut aliis nocere debet<sup>h</sup>. Non obstat quod Vlpianus respōdit<sup>i</sup>, in ciuilibus dissentionibus<sup>\*</sup>, qui in alterutram partē discessissent, vice ho-

<sup>a</sup> l. 3. §. vlt. D. adl. Cor. de sca. l. vlt. de roditores. D. de re militar. b l. transfu. gam. D. de acq. rer. dom. c Gloss. & Bart. ex. quod sunt rebel. Curt. l. ius. conf. 137. d l. 2. §. vlt. c. ml. seq. D. de don. e Bart. in l. hostes. D. de captiu. l. ius. in c. olim. 1. de restit. spcl. in c. scilicet & infra de iur. iura. f d. l. possilimum §. a piratis. D. de captiu. d. l. a latronibus. D. de testam. g c. cum cessante. de appellat. l. adigere. D. de iur. patro. h l. doli. C. de per. et com. rei vend. i in l. si quis ingennam. §. in ciuilibus. D. de captiu.

DE IVRE ET OFF. BELL.

stium non esse : eorū scilicet, inter quos iura captiuitatis & postliminij vigent: ideoque captos hinc inde non fieri seruos, & quod cōstitutionibus regni Hispaniæ, in ciuilibus dissentionibus capta iubetur cum septuplo restitui<sup>a</sup>. Nam hæc locum habent, cū ciues inter sese dissentiunt, & tumultuantur : non autē cū quid contra maiestatem imperij machinatur, & in exitium reipub. contendunt<sup>b</sup>. tunc enim hostium numero haberi incipiunt<sup>c</sup>. Itaque Vlpianus vsus est vocabulo partis. partes autem dicit ait Cicero<sup>d</sup>, cū scissa in duas partes reipub. ciues inter se contendunt, quæ etiam factiones dicuntur à Cæsare<sup>e</sup>. bellum verò, quod Antonius inferret reipub. non partiū certamen, sed defectionem à populo Romano vocari debere. Hinc quoque Cicero<sup>f</sup> dissentit à Cæsare, qui propter legem Semproniam, quæ iniussu populi de capite ciuis Rom. iudicari vetebat, non cēsebat mortis pœnam irrogandam Cethego & Lentulo, catilinariæ coniurationis sociis, ad quæ docet Cicero legem Semproniam. quæ de ciuibus Romanis cōstitutæ est, ad eos, qui essent reipub. hostes, qui certē ciues esse

<sup>a</sup> Reg. lib. 16  
tit. 26. par. 2.

<sup>b</sup> D. §. in ciuilibus.

<sup>c</sup> L. amissio ne. §. qui deficiunt. D. de cap. manu. L. nihil interest.

L. postliminiū §. transfuge.

D. de captiu. L. vlt. D. ad l. Iul. Maiest.

d Philop. 13.

e De bello Gallic lib. 6.

f in Catil. 4.

esse nullo modo possent, nō pertinere. Sic certè bello cum Latinis, Campanis, Fidenatibus, Hernicis, Æquis, Hetruscis, aliisque populi Romani sociis, quos subditos, non participes imperij, fuisse satis cōstat ex Liuiο<sup>a</sup>, Appian.<sup>b</sup> & Dionys. Hal.<sup>c</sup> deficiētibus, & rebellātibus, legimus victos oīa hostilia passos fuisse, & capta prædę cessisse, atq; captos in seruiturē redactos: imo multo durius cum iis actū fuisse, quàm cum aliis hostibus. censebant enim maximè ita rebellantes in officio posse contineri, si id actum esset, ne possent rebellare. quamdiu enim malis relinqueretur malefaciēdi facultas, ad fore & voluntatem. Atque ita Capua, quæ per deditionem populi Rom. facta fuerat<sup>d</sup>, cū ad Pœnos defecisset, expugnata à Romanis, lxx. pondo auri, & argenti tria millia ex præda ad quæstores delata sunt; lxx. principes senatus interfecti: recentis ferme nobiles Campani in carcerem conditi, variis casibus interierunt: multitudo alia Campanorum venundata: ager omnis & tecta publica populi Romani facta sunt<sup>e</sup>. Similiter cum Fidenatibus, quæ erat colonia populi Romani, rebellantibus actum<sup>f</sup>.

<sup>a</sup> lib. 2. c. 8  
<sup>b</sup> de bell. cō-  
 uil. lib. 1.  
<sup>c</sup> lib. 3. c. 4

<sup>d</sup> Liuius li. 7

<sup>e</sup> Liuius l. 36

<sup>f</sup> Liuius li. 4

DE IVRE ET OFF. BELL.

Ænna quoque, in Sicilia, vt superius diximus, quæ præsidio Romanorum tenebatur, cum ad defectionem spectaret, cum magna cæde ciuium direpta fuit <sup>a</sup>. eodem modo postquam Gallia in provinciam esset redacta, cum Gallis rebellibus actum fuisse passim inuenias apud Cæsarem. Porrò in dissentionibus <sup>\*</sup> ciuilibus non inutilis futura videtur lex Solonis: quæ, inter alias antiquissimas, Athenis axibus ligneis incisa erat: qua cavit, vt qui exorta seditione populari, & scissa in duas partes ciuitate, neutri se adiunxisset, hic domo, patria, fortunisque careret, exul, extorrisque esset. Quod & Phauorinus philosophus inter fratres quoque & amicos dissidentes fieri oportere censuit: vt vtriusque partis amici, si ad concordiam componendam parum auctoritatis habuerint, tum alter in alteram partem discedat, & hac ratione viam sibi ad vtriusque concordiam muniant <sup>b</sup>. Equidem hanc legem hisce nostris temporibus vtilissimam fore censeo, ad hoc, vt exorta aliqua factione malorum, protinus omnes boni communibus viribus eos opprimant, neque se vnà cum repub. opprimi patiatur: vt, proh dolor! cum

a *Liuius lib.*  
34.

b *Gell. lib. 2.*  
cap. 2.

cum magno reipubl. Christianæ detri-  
 mento, & huius Belgij euerfione passim  
 fieri videmus. dum enim boni nimia sua  
 modestia, & patientia, malis conatibus  
 feditioforum ciuium concedēdo, se pa-  
 cem habituros confidunt, durissimum  
 sibi feruitutis iugum iniiciūt: quod po-  
 stea frustra excutere conantur. & fit, vt  
 cū bonorum iacturam aut vitæ peri-  
 culum pro repub. adire reculant, neces-  
 sariò cum republ. pereant. omne enim  
 malum nascens, vt inquit Cic. facile op-  
 primitur, inueteratum fit plerumque  
 18 robustius. Neque etiam \*semper tutif-  
 simum erit, quod plerique arbitrantur,  
 non interponere se bello, sed spectatorē  
 belli, fortunarumque alienarum, euen-  
 tum sine vlllo discrimine rerum suarum  
 operiri, quod legati Antiochi & Æto-  
 lorum, qui Romanos Græcia expellere  
 conabantur, Achæis amicis Romanorū  
 persuadere nitebantur, petentes vt sal-  
 tem neutri parti se adiungerent. nam ad  
 ea T. Quintius Proconsul, nihil tam a-  
 lienum à rebus Achæorum esse ostēdit:  
 quippe, siue gratia, siue dignitate, præ-  
 mium victoris futuros<sup>a</sup>. Aristenus quo-  
 que prætor Achæorum, cū Romani<sup>35</sup>.

*a Linius lib.*

DE IVRE ET OFF. BELL.

primùm eorum amicitiam expeterent,  
& Philippus saltè ne armis interessent,  
postularet, oratione ad suos habita o-  
stendit, Romanos aut socios habendos,  
<sup>a</sup> *Limul. 32* aut hostes; mediam<sup>a</sup> viam nullam esse: 19  
quæ, vt Pontius Samius dicebat, neque  
amicos parat, neque inimicos tollit. Ita-  
que Portius Cato, summus vir, Pôpeto  
& Cæsare inter se contendentibus, quã-  
uis a factionum auctõribus multis in re-  
bus causa reipub. dissentiret, & neutrius  
mentem planè probaret; tamen bello  
exorto: non sibi quiescendum existima-  
uit, sed eas partes secutus est, quæ plus  
æquitatis habere viderentur, Bruto etiã  
dehortante, cui prudenter respondet:

*Summum Brute nefas ciuilia bella fatemur,*

*Sed quo fata vocant, virtus secura sequetur.*

<sup>b</sup> *lib. 2.*

Et cetera, quæ carmine profèquitur Lu-  
canus<sup>b</sup>. Sed hæc deliberatio, vt rius par-  
tes æquiores sint, in democratia vel ari-  
stocratia, scisso imperio, quod pluribus  
commune est, admitti potest; in monar-  
chia verò, optimus & prudentissimus  
quisque, principis\*, apud quem summa 20  
imperij est, auctõritatem sequetur, cõtrã  
seditiosos & turbulentos ciues, & iudici-  
tos. postquam enim visum est reipub.  
per

per vnum consuli<sup>a</sup>: cui lege regia populus omne imperium in se, potestatemq; concessit<sup>b</sup>, quique est communis omnium parens<sup>c</sup>: & cui diuina lege obedire iubemur<sup>d</sup>: eum, non secus ac patriam, defendere & tueri quilibet debet.

Et quidem, vt inquit Cicero, nulla iusta

21 \* causa videri potest aduersus patriam arma capiendi. & Plato nefas esse duxit, vi vti contra patrem vel matrem, omnium verò maximè contra patriam. Nulla autem tanta impietas, nullum tantum scelus, quod sit parricidio vindicandum<sup>e</sup>.

Parricidā verò patriæ vocat Cicero Antonium; quòd reipub. bellum inferret: cuius certè salus præferri debet saluti

22 patris<sup>f</sup>. Rempub. voco\*: in quo sanctissimū nomen patriæ cōtineri dixit Cornificius<sup>g</sup>; non solum ipsum, quod absurdum esset. nam omne solū viro forti patria est: sed vt Cicero interpretatur, cœtum ciuium iuris consensu, & utilitatis communione sociatum. Quò spectat quod Cælorinus apud Appianum<sup>h</sup>

legaris Carthaginensium respōdit: civitatem Carthaginensium, quam Romani promiserant liberam fore, non in muris & ædificiis consistere: quæ delere vellent.

a l. 2. §. no-  
uissime. D de  
orig. iur.

b L. 1. D. de  
constit. princ.

c Authen.  
neq; vt quod  
ex donat. in  
fine.

d Paul. ad  
Roma. 13.

e Quintil. de  
cla. 286.

f I. minimè  
D. de religio,  
& sumptib.  
funer. L. ve-  
luti. D. de  
iust. & iur.  
g ad Heren.  
lib. 4.

h In bello  
P<sup>mo</sup>.

DE IVRE ET OFF. BELL.

vellent. Factionem verò optimatum, & seditionem, & conpirationem populi remp. dici non posse, idem Cicero asserit. iniustus enim populus, quem tyrannum vocat, non potest rempub. constituere. Nam vt modò diximus, qui hostili animo aduersus rempub. vel principem est animatus, cùm natura sit ciuis, voluntate fit hostis, diciturq; perduellens <sup>a</sup>: quo nomine hostes appellari solent <sup>b</sup>. Et quidem hæc duo, princeps & respub. ita connexa sunt & copulata, vt illius hostis nemo esse possit, quin etiã sit huius, & e conuerso <sup>c</sup>. Pro patria verò mori, & ei nos totos dedere, & in ea nostra omnia ponere, & quasi nos consecrare debemus, vt inquit Cicer. <sup>d</sup> & vt idem ait, laudandus est, qui mortem optet pro repub. quiq; docet chariorẽ esse patriam nobis, quàm nosmet ipsos. Omnia itaque quæ agimus, non ad nostram vtilitatem & commodum, sed ad patriæ & principis salutem conferre debemus. quo nomine Demarathus Lacedæmonius, Aristides, Phorion & Themistocles Athenienses; Tarquinius Collatinus, Camillus & Rutilius Romani, maximam laudẽ meruerunt: qui omnes iniurias

<sup>a</sup> in l. ult. D. ad leg. lul. maiest. <sup>b</sup> l. quos nos. D. de verbo. sig. <sup>c</sup> d. l. ultim.

<sup>d</sup> de legibus lib. 2.

iniurias à patria illatas, æquissimo animo tulerūt, & nullam vindictam, quamvis nō deesset facultas, moliti sunt. quin Themistocles, sumpto veneno, mori maluit, quàm Persurum regi, a quo magnis honoribus & præmiis erat affectus, operam suam ad bellum patriæ, licet ingrata, inferendum præstare. & Camillus, vir optimus, & de patria optimè meritus, in exilium actus, patriæ in extremo periculo, immemor iniuriæ, opem tulit, eamque hostibus expulsis, restaurauit.

- 23 Inobedientia\* autem subditorum, & rebellio in principem, grauissimum crimē habetur, & hæresi comparatur <sup>a</sup>: & inobediens dicitur infidelis <sup>b</sup>. Quomodo enim, inquit D. Hieronymus, fidelis esse poterit, in substantia Dei, qui carnaşi Domino fidem adhibere non potuit <sup>c</sup>. ideoque ob quantumuis graua onera a rege subditis imposita, non licet rebel-  
lare. nam melius est omnia mala pati, quàm malo consentire <sup>d</sup>. & quamuis o-  
nus a superiore impositum sit difficile, nihilominus tamen ferendum est, & pia  
deuotione tolerandum <sup>e</sup>, propter bonum obedientię. generale enim pactum est societatis humanæ, obtemperare re-  
gibus

<sup>a</sup> c. sciendum.  
8. qu. 1. c. si  
papa. 40. dia  
stinct.

<sup>b</sup> c. nullus.  
38. dist.

<sup>c</sup> c. si apud  
23. quæst. 5.

<sup>d</sup> c. ita nec  
32. quæst. 5.  
cap. Lothia-  
nus. 31. qu. 2.

<sup>e</sup> c. in memo-  
riam. 19. dist.

DE IVRE ET OFF. BELL.

a c. que contra, de fl. 8.

gibus suis<sup>a</sup>. Quare quamvis Roboam, filius & successor Salomonis, nollet vel minimum Israëlitis, de iugo durissimo ipsis imposito per Salomonē, minuere: sed diceret, quod gravi iugo, a patre imposito, grauius superadderet: ideoque decem tribus Israël scissæ a tribu Iudæ & Benjamin, relicto rege suo, Hieroboā fecissent regem<sup>b</sup>, non tamen ex eo extra culpam fuerūt. nam indignatus est Dominus omni semini Israël, & demoliuit eos, & dedit eos in direptionem, donec abijceret eos a facie sua. quia scilicet ab unitate dissipati, alterum sibi regem cōstituisent<sup>c</sup>. Similiter quamvis Nabuchodonosor rex esset infidelis, & plurima mala faceret<sup>d</sup>, & statuam suam aureā adorari præciperet, & eos, qui non adorassent, mitti in fornacē ignis ardentis: tamen dixit ei Daniel: Tu rex regū es, & Dñs cæli regnum, & fortitudinē & imperiū dedit tibi. & Dominus per prophetam Hieremiā ait: Dedi omnes terras istas in manu Nabuchodonosor regis Babilonis, serui mei: in super & bestias agri dedi illi, & seruient illi omnes gentes, & filio eius, & filio filij eius: donec veniat tempus terræ eius, & ipsius, & seruient

b 3. Reg. 12.

c Cypri. lib. 1  
e. 1. 6. c. de  
miquo. 7. qu. 1  
d Hier. 39.

e Daniel. 3.

f Daniel. 2.

„ seruient ei gētes multę, & reges magni<sup>a</sup>. a Hiere. 27.  
 „ Et propheta Baruch: Orate, inquit, pro  
 „ vita Nabuchodonosor regis, & pro vita  
 „ Balthazaris filij eius, vt sint dies eorum  
 „ sicut dies cęli super terrā<sup>b</sup>. & Ezechiel b Baruch. 1  
 propheta grauitur inuehitur in Sede-  
 chiam regem Iudę, accusans eius perfidiam,  
 & rebellionem cōtra regem suum Nabuchodonosor<sup>c</sup>. Sed & David rex c 2. Para. 26  
 Hebręorū diuina auctoritate designatus,  
 tamen Saulem (qui per legem diuinam regno  
 erat priuatus) regnantem & illi infensum,  
 semper est honore regio persecutus, & cū  
 posset eundē, in speluncam, in qua latebat,  
 ingressum, solū paruo negotio obtruncare,  
 noluit, negans se extēsurum manum in  
 christum Domini<sup>d</sup>. iussit quoque David occidi  
 illum, qui nūtiabat se occidisse Saulem,  
 inquit: Quare non timuisti mittere  
 manum tuam in christū Domini<sup>e</sup>? Re- e Reg. 2. c. 1  
 ges ergo & principes, si boni sunt, tanquam  
 à Deo missi ad vindictam malorum, laudem  
 verò bonorum, vt inquit Petrus<sup>f</sup>, summa  
 pietate coli debent; sin f Epist. 1. c. 2  
 mali, patiēter tolerari. principum enim  
 & regum peccata ferenda sunt, & ad Dei  
 iudicium reijcienda, cui placet interdū  
 popu-

DE IVRE ET OFF. BELL.

populos, ob ipsorum peccata, iniquitate principum affligi. nam, ut est in sacris literis<sup>a</sup>, Deus regnare facit hominem hypocritam, propter peccata populi<sup>b</sup>. nulla autem potestas nisi a Deo, ut Paulus testatur<sup>c</sup>, qui nos principibus obedire iubet<sup>d</sup>. & Petrus, etiam dyscolis dominis, nos parere vult<sup>e</sup>. & idem docet honorandos esse reges: cum tamen tunc nullus adhuc rex Christi fidem accepisset, sed omnes essent infideles, & in Christianis persequendis crudelissimi (neque enim Neronis & Domitiani, & aliorum crudelitatem tot scriptorum literis celebratam, quisquam ignorat) iisdem tamen Christiani ex præcepto Dei obediebant, quatenus nihil præciperetur, quod Deum offenderet: cui sciebant magis obediendum, quam hominibus<sup>f</sup>. Ex his certè<sup>\*</sup> 24 liquet, quod quamvis tyrannum, qui per vim & illegitimè principatum occupavit, si tyrannis aliter tolli non possit, occidere cuilibet licitum sit: & per legem Valeriam, sacrum esset cum bonis caput eius, qui consilia regni occupandi iniisset<sup>g</sup>: illum tamen, qui iure successionis, electionisve princeps est, quamvis iniquè & crudeliter agat, privato non licere

<sup>a</sup> Job cap. 14

<sup>b</sup> Alphon. de Cast. contra here. in verb. Potestas.

<sup>c</sup> ad Rom. 13

<sup>d</sup> ad Tit. 3.

<sup>e</sup> epist. 1. c. 2

<sup>f</sup> Actor. 1.

<sup>g</sup> Plut. in vita P. Valerij.

P. Dion.

Ha. lib. 5.

licere occidere, neque populo eum reijcere, vel ab eo deficere <sup>a</sup>. idque concilio Constantiensi <sup>b</sup> decisum est: quo etiam hæretici declarantur contrariæ sententiæ  
 25 assertores <sup>c</sup>. legitimus \* enim princeps, quamuis crudelis & iniquus, tyrannus  
 26 dici non potest. cumque lege \* regia, imo ex ordinatione Dei, omne imperium & potestas principi in populū sit collata; illum iudicare populus non poterit. nō enim potest inferior iudicio superiorē ligare <sup>d</sup>. Quò spectat quod propheta ait <sup>e</sup>: Nunquid gloriabitur securis cōtra eum, qui secat in ea? aut exaltabitur ferra cōtra eum, qui trahit eam? ex quibus luce clarius esse Nicolaus Papa rescriptit, non posse quemquam, qui minoris auctoritatis est, eum qui maioris potestatis est, iudiciis suis addicere, aut propriis definitionibus subiugare <sup>f</sup>. Itaque rectè M. Aurelius Imperator populo magistratum, magistratui regem, regi verò Deum iudicem constitutum dixit. Et quidem si princeps, qui potestatem a Deo habet, indicta causā, neminem punire aut condēnare potest <sup>g</sup>: qua auctoritate subditi, qui nullā potestatem acceperunt, principem, cuius in potestate

<sup>a</sup> Felin. in concilio nobis.

<sup>b</sup> ex. de præscript. Bruc. in reper. in verbo Tyrannus. Domin.

<sup>c</sup> a Soto de iust. & iur. lib. 5.

<sup>d</sup> qu. 1. art. 8.

<sup>e</sup> sess. 15.

<sup>f</sup> Alphons de Cast contra here. in verbo Tyrannus.

<sup>g</sup> d. c. inferior. 21. dist. 1. nō magistratus.

<sup>h</sup> D. de recep. arb.

<sup>i</sup> c. Esai. 10.

<sup>j</sup> in d. c. inferior.

<sup>k</sup> Clement. pastoris de censib. & re iudic.

C & im-

DE IVRE ET OFF. BELL.

& imperio sunt, & cui obedire iubetur, suo arbitrio expellere, aut reijcere poterunt? cùm ne tyrannus quidē, lege Solonis, indicta causā occidi posset; & cùm iuri naturali repugnet, vt inferior habeat imperium in superiorem, & vt idē sit accusator & iudex. Grauibus ergo pœnis coërcetur, ex primo capite legis Iuliæ, non solùm qui principē occidit, sed etiam cuius operâ, dolo malo, consilium occidendi in initum fuerit, vel quid contra maiestatem imperij machinatū<sup>a</sup>. Sed & si quamcunque infamiam, quamcunque pericula, mortem denique, si res ita postulat, pro salute principis, & patriæ subire, iura diuina, & humana cogunt, quæ iusta rebellandi causa esse potest? Quemadmodum enim videmus in corpore humano, omnia mēbra capiti, tanquā parti nobiliori, obedire, qualiacunque tādē præcipiat, & pro eius salute nullum recusare periculū: sic quoque subditi, qui sunt mēbra reipub. salutem principis, qui reipubl. caput est, proprio commodo præferre debent. & huius quoque sententiæ assertores fuere, qui inter Hebræos præcipui habiti sunt, Essæi vocati, id est executores legis diuinæ: qui

a l. 1. c. ad  
l. 1. de maiest.  
L. quisquis  
eod. tit.

næ: qui reges & principes, qualescunq; tandē sint, subditis inuiolabiles esse debere, dixerunt, tanquam a Deo missos. Neque quemquam mouerit exemplum Tarquinij Superbi, qui regno pulsus est, propter sua scelera: tum quia nō rex, sed verē tyrannus fuit: (non enim legitimè, sed per vim, netario scelere, occiso Tullio socero suo, regnū adeptus est<sup>a</sup>.)  
 tum etiam quia, vt I. C. ait, nō quid Romæ fiat, sed quid legitimè fieri debeat, spectandum est<sup>b</sup>. errant enim, vt inquit Cicero, qui quod exemplo fit, id etiam iure fieri putāt. Et hæc quidem ita procedunt, si summum imperium sit apud vnum principem; sin verò sit apud populum, vel optimates, certè hoc casu sine dubio licebit cum tyrāno iure agere, si tempora permittāt; sin minus, licebit eum vi opprimere, & quauis ratione tyrannum è medio tollere. Itaque senatus priorē viam secutus est in Nerone tollendo: posteriorem in Maximino. Sciēdum est enim Imperatores Romanos non habuisse summum imperium, quāuis plerique id sibi tyrannicè vsurpaerint. idque indicant hæc Suetonij verba in Caligula; Parū absuit, inquit, quin

<sup>a</sup> Dion. Hal. lib. 4.  
<sup>b</sup> L. sed licet. D. de off. pref.

<sup>c</sup> Appianus in procæmio l. 1.

DE IVRE ET OFF. BELL.

speciem principatus in regnum cōverteret. non enim erant imperatores aliud quàm principes, imperium verò erat apud populum <sup>a</sup>. Reges verò imperio abutentes\* poterit summus Pontifex, variis modis coërcere, & cōpellere vt administrarent iusticiam <sup>b</sup>. gerit enim vices Dei in terris, a quo vtrumque gladium accepit, spiritualem & temporalem, ad reipub. Christianæ quietem, & conseruationem <sup>c</sup>. Itaque Nicolaus Papa Lotharium reprehendit propter sua peccata <sup>d</sup>. & Gelazius Anastasio minabatur <sup>e</sup>. Innocentiuseius nominis primus, Arcadium Imperatorem, eò quòd sanctum Ioannem Chrysoptomū e sede sua pelli permiserat, excommunicauit <sup>f</sup>. Sed & si Reip. Christianæ omnino conueniat, non solùm coërcere poterit, sed etiam destituere. quemadmodum Deus (cuius vicarius est Pontifex) Saulem regno priuauit, & Dauidem in locū eius surrogauit <sup>g</sup>. sicque Zacharias Pontifex, Childericum eius nominis tertium Francorum regem destituit, & Francos iurandi religione exsoluit <sup>h</sup>. Innocētius quartus, Fredericum II. Imperatorem, propter sua scelera primū excommunicauit,

<sup>a</sup> Bodin. de rep. lib. 1. c. 8.

<sup>b</sup> c. administratores. 23. q. 5.

<sup>c</sup> c. nonit. de iudic. c. vna sanctam. c. 2. de maio. et obed.

<sup>d</sup> in c. scelus. 2. quest. 1.

<sup>e</sup> in c. alius. 15. quest. 6. f. c. duo sunt. dist. 96.

<sup>g</sup> 1. Reg. c. 6

<sup>h</sup> c. alius. 15 quest. 6.

nicauit, & cū nihil proficeret, indignū imperio iudicauit, & subditos a vinculo sacramenti liberauit<sup>a</sup>. & idem Innocētius, Lusitanæ regi, propter suam negligentiam, fratrem ipsius Comitē Benoniensem, collegam dedit<sup>b</sup>. Hanc verò potestatem populo tribuere, vt nōnulli voluerunt<sup>c</sup>, non solū absurdum est, & iniquum, sed etiam ad reipub. euersionem spectat, non enim rex, si aliquantum contra volūtatem populi imperat, protinus iniquus, & tyrannus dicendus est. nam ista ratione nulli sint reges. Ac Moyses ipse iustissimus, & sapiētissimus princeps, idem tyrannus iudicaretur: quòd omnia fere iuberet, ac prohiberet contra populi volūtatem. Sed nec monarchia, vel regia potestas dicenda est, cū arbitrio populi respub. gubernatur a rege: quoniam status reipub. pendet a populo. quo nihil stultius, nihil intemperantius, & cū in bonos exarsit, nihil furiosius. Multitudinis namque, vt rectè Liuius, ea est natura, vt humiliter seruiat, aut superbè dominetur. & Xenophon, idem imperator bonus ac Philosophus, popularem potentiam virtutibus inimicam esse testatur: nec aliter

<sup>a</sup> cap. ad Apostolica. de sent. et re iud. in 6.

<sup>b</sup> c. gadi. de supplend. negligenc. prelat. lib. 6.

<sup>c</sup> Fer. Vazq. illust. quest. lib. 1. c. 5. un.

10. Hectom. in Fræcogalia. Girard. de

Bernard. in hist. Franc. l. 3.

DE IVRE ET OFF. BELL.

stabiliri posse, quam bonis omnibus eiectis. quod Seneca paucis verbis complexus est: Quis enim, inquit, placere potest populo, cui placet virtus? Sic certe legimus, apud Athenienses & Romanos, longè præstantissimos ciues, & de republ. optimè meritos ostracismo, exilio, morte, per inuidiam, iniuste a stulta & ingrata plebecula multatos fuisse. Præclare autem Anacharsis Scytha, Atheniensium republ. breui perituram prædixit: quòd sapientes in ea consulerent, stulti verò iudicaret. videbat enim senatum, reipub. cõsilia, quibus nihil sanctius esse debet, à populo petere; id est a stulto & infano, prudentiam. Neque verò tam absurdum erat, quamvis absurdissimum, omnes omnium opes, quàm summum imperium inter ciues equare: quòd, vt rectè Bodinus<sup>a</sup>, opibus quisque frui potest; imperadi verò prudentia paucissimis est a natura tributa. Et quidem si metuendus est tyrannus, multò magis metuenda est tyrannorum multitudo. Qui autem populare imperium Ro. laudant, non satis illorum historias legisse videntur, neq; perpendisse calamitates tot seditionum, secessionũ,

conten-

<sup>a</sup> in method.  
hist. cap. 6.

contentionum, & bellorum ciuiliū, quæ repub. toties affligerunt. quorū omnium certè, cōmunio imperij, quod ex æquo partiri difficile est, causa fuit. sed de his pluribus agere instituti nostri  
 28 ratio non permittit. Vt ergo iustas\* belli causas prosequamur, bellū aduersus infideles, ex eo solum quòd infideles sunt, ne quidem auctoritate imperatoris, vel summi Pontificis, indici potest<sup>a</sup>, infidelitas enim nō priuat infideles dominio quod habent iure gentium. nam non fidelibus tantū rerū dominia, sed omnirationabili creaturæ data sunt. Domini enim est terra, & plenitudo eius, orbis terrarum, & vniuersi qui habitāt in eob.  
 & Dominus solem suū oriri fecit super bonos & malos<sup>c</sup>. Itaque quamuis Nabuchodonosor esset infidelis, tamen dominus dedit illi regnum & imperiū, vt modo diximus. & hæc sententia plerisq; probatur, vt ostēdit Couarruias<sup>d</sup>. Sed nec ex eo capite bellum dicitur iustum cum infidelibus, quòd puta. imperatori  
 29 \*tanquam totius mundi domino parere recusent, ex receptissima interpretū sententia<sup>e</sup>. nam communem hanc opinionem falsam esse, & imperatorem nō esse

a l. Christiani. C. de pag. & fact. et temp. eor. c. dispar. 23. quasit. 8.

b Genes. c. 1.  
 c Matt. 5. in fin. & c. 6. in prim.

d in c. peccati. de reg. iur. in 6. 2. par. relest. §. 9.

e in l. be e a Lenone. C. de quadr. prescript. in l. de precatio. D.

ad leg. Rhod. de iact. in l. curstos popu-

tos. C. de summa Trinit. &

fide Cath. in l. hostes Di. de captiui.

DE IVRE ET OFF. BELL.

totius mundi dominum, a viris doctissimis apertè ostensum est<sup>a</sup>: quos refert & sequitur Couar.<sup>b</sup> & Ferd. Vazq.<sup>c</sup> Vnde ex hac causa non poterit imperator iustum bellū inferre infidelibus, qui eius imperio subditi non sunt, siquidem nemo punire potest eum, quem nō habet in sua potestate<sup>d</sup>. Nec itē ex auctoritate summi Pont. poterit dici, istud bellum iustum. nam is in infideles iurisdictionē non habet, nec temporalem, nec spiritalē: nisi quatenus ea necessaria est ad Christianæ reipub. quietem & vtilitatē. & ad ecclesiam non pertinet, punire infideles, qui nunquā Christi fidem susceperunt, secundū illud Pauli ad Corinth.<sup>e</sup> Quid mihi de his qui foris sunt, iudicare? Vbi Thomas dicit, prælatos ecclesiæ accepisse potestatem tantum in eos, qui se fidei Christianæ semel subiecerunt. vnde hæreticis\*, qui a fide Christiana defecerūt, iustum bellum infertur. Quare de re pulchrè Alphon.<sup>a</sup> Cast.<sup>f</sup> Contenditur verò iusto bello cum infidelibus, ex causis, ex quibus cum aliis quibuscūque bellum gerere licet &. tum etiam ex eo quod forte fidem Christianam blasphemis, pravisque persuasionibus impediunt,

<sup>a</sup> Card. Alb. Fulg. Alc. Chas. Dormin. <sup>a</sup> Soto et alijs <sup>b</sup> in d. l. peccatorum d. 9. <sup>c</sup> quest. 11. <sup>d</sup> l. 1. c. 20. <sup>e</sup> si q. <sup>d</sup> l. ult. D. de iuris. omni. iud. c. ult. de consuet. in 6. l. 1. et toto tit. C. vbi de crimin. agi oportet.

<sup>e</sup> cap. 5.

<sup>f</sup> l. 2. de iust. her. pun. <sup>g</sup> c. dispar. 23. <sup>q</sup> l. 1. uno. <sup>e</sup> DD. in cap. quod super his de voto. Thom. 2. 2. q. 10. art. 8.

pediant, atque item legis euangelicæ liberam prædicationem : quia fit iniuria Christianis, qui habent ius prædicandi euangelij, per vniuersum orbem. Et hæc quidem iustæ belli gerendi causæ, per p̄so iudicio principibus ac regibus (penes quos est belli auctoritas atque consilium<sup>a</sup>) sunt æstimandę: qui si forte humana cupiditate bellum gerant \*, non nocebit militibus, qui obedire debent principi. Itaq; inquit D. Augustinus<sup>b</sup>; *b lib. 22. cõtra Faals.*  
 » Vir iustus, si forte sub rege homine etiã *Man. c. 75. de c. quid culpe-*  
 » sacrilego militet, rectè potest illo iubete *tur.*  
 » bellare, ciuicæ pacis ordinem seruã. cui  
 » quod iuberur, vel non esse contra Dei  
 » præceptum certum est, vel vtrum sit, certum non est: vt fortasse reum regem faciat iniquitas imperandi; innocentem autem militem ostendat ordo seruiēdi.  
 32 Vnde & Christiano \* militi etiam sub imperatore pagano militare permissum est. nam & Iulianum Cæsarem apostatã milites Christianos habuisse legimus: quibus cum diceret, Producite aciẽ pro reipub. defensione, obediebãr: cum autem diceret, producite aciẽ in Christianos, agnoscebant imperatorem cæli<sup>c</sup>. *c c. Iulianus 11. quest. 3.*  
 quos cum idẽ imperator donatiuo dato

DE IVRE ET OFF. BELL.

ad sacrificia deorum gētilium pellicere tentasset, donatio imperatori reddito, christianilmū liberrimē professos, cum martyrij desiderio, exauctoratos fuisse

a *Soz. m. l. 5*  
*c. 17. Cassio.*  
*lib. 6. crispere.*  
*hist. c. 30. Nj-*  
*ceph. lib. 10.*  
*cap. 23.*

tradunt<sup>a</sup>. Legimus quoque Marcū Aurelium Antoninum, Christianorū, qui sub ipso merebant, precibus (quibus sibi pluuiam, hostibus fulmina a Deo impetrarunt) bellum Marcomanicū, Sarmatis, Vandalis, Quadis deuictis, con-

b *Paul. Oro-*  
*ph. lib. 7. c. 15.*  
*Euseb. lib. 5.*  
*eccl. histor. c.*  
*5. Nreph. l. 4*  
*c. 12.*  
*c. AEt. 1. cap.*  
*15. q. 6.*  
*et d. c. Indie-*  
*mus,*  
*d. Pet. 1. c. 2.*

fecisse<sup>b</sup>. Ex quibus docemur sub imperatore pagano, vel etiam hæretico, subditis licere militare, nisi liquidò constet bellum iniustum esse. nam Deo magis seruiendum, quàm hominibus<sup>c</sup>. Quāuis enim etiam infideli regi<sup>\*</sup>, & iniquo parendū esse doceamur<sup>d</sup>; tamen habet<sup>33</sup> hæc obedientia suos limites. vnde licet filiis Israēl præceptum esset a Deo, vt obedirent regi Nabuchodonosor; tamen cū idem rex iussisset, vt statuam suam auream adorarent (quod præceptum fines excedebat potestatis regię) tum potius habuerunt, qui optimi erant inter filios Israēl, in fornacem ardentem conijci, quam ei præcepto regis obedire, quorum voluntatē sic Deus approbavit, vt illæsos ab igne conseruauerit<sup>e</sup>.

e *Dan. 2.*

Quò

Quò spectat quod Christus ait in euā-  
 gelio a: Reddite quæ Cæsaris sunt, Cæsa-  
 ri; & quæ Dei, Deo. quod & Paulus A-  
 postolus d<sup>d</sup> p̄sanissimè expressit, cum ait. b ad Rom. 13  
 Reddite omnib. debita, cui tributum,  
 tributum; cui vectigal, vectigal; cui ti-  
 morem, timorem; cui honorem, hono-  
 rem. Ex superioribus quoque colligere  
 licet, quòd quæ hætenus de iustis belli  
 causis dicta sunt, magis ad æquum & bo-  
 num, & viri boni officium, quàm ad iu-  
 ris effectus referri debent. cum enim  
 summis tantum principibus, qui supe-  
 riorem non habent, belli gerendi ius sit,  
 de æquitate causæ disceptare non con-  
 uenit. hinc certo modo iustum \* po-  
 terit dici bellum, etsi non ex iusta causa  
 geratur. iusti enim. variæ sunt significa-  
 tiones: vt annotauit Budæus c. neque  
 semper æquitatem, & iusticiã designat,  
 sed aliquando etiam plenitudinẽ quan-  
 dam significat. quo sensu dicuntur iuste  
 nuptiæ d, iustum matrimonium e, iusta  
 ætas f, iusta persona litem instituendi g,  
 iustus filius h, iusta libertas i: eo quæ sen-  
 su iustum prælium dixit Liuius k. simili-  
 ter iustum bellum dicitur, quod publicè  
 legitimeque geritur ab iis, qui bellige-  
 randi

a *Matth. 22.*b *ad Rom. 13*c *l. 3. D. pro socio.*d *inst. de nupt. in prin. et l. nuptia. l. et nihil. D. de ritu nuptiar. e in l. Clau- dius. D. de his quib. ut in- dig. l. 1. D.*e *unde vir et ux. Quentil. l. 5. cap. 10.*f *in l. 2. §. 1 D. de vaca-*g *mun. L. ait Diuus. D. de*h *iure fisc.*i *in l. in u-*j *umerfis. C. qui dar. tutor. vel curas. pos.*k *in l. 2. D. de adopt.*l *Cicer. in Topic. l. 1. D.*m *si quis test. lib. l. genera-*n *liter. D. quæ et a quib. ma-*o *nu. k lib. 49.*

34

DE IVRE ET OFF. BELL.

*a in l. hostes.  
D. de captiv.*

*b l. hostes. D.  
de verb. sign.*

*c Dion. Hal.  
lib. 2.*

*d l. postlimi-  
nij. D. de ca-  
ptivi.  
e d. l. postli-  
minij. in prin.*

randi ius habent . Itaque Ulpianus<sup>a</sup>,  
Hostes, inquit, sunt, quibus publicè po-  
pulus Roma. bellum decreuit, vel ipsi  
populo Roma. ceteri verò latrunculi,  
vel prædones appellantur. Et Pompo-  
nius<sup>b</sup>: Hostes, dicit, sunt, qui nobis, aut  
quibus publicè nos bellū decreuimus:  
ceteri verò latrones, aut prædones sunt.  
Vnde hoc bello, licet non ex iusta causā  
geratur, iura belli, captiuitatis & postli-  
minij, quæ hostibus cōueniunt, locū ha-  
bebūt. quod ex eo satis probatur, quòd  
cū Romani nō nisi iustis ex causis bel-  
lum mouerent, quod iure feciali diligē-  
ter cautum erat<sup>c</sup>: tamen hostes eorum,  
qui iustam belli causā habere non po-  
tuerunt, quæ vtrinque iusta esse non po-  
test, capta hoc bello etiam iure Roma-  
norum sibi acquirebant, & captos in  
seruitutem redigebant<sup>d</sup>. id quæ verū est,  
etiam si liquidò constaret de iniquitate  
hostiū. quod Paulus I. C. satis indicat e,  
cū ait: Naturali æquitate inductū esse.  
vt qui per iniuriam ab extraneis detine-  
batur, is vbi in fines suos rediisset, pristi-  
num ius suū reciperet: iure scilicet post-  
liminij. Ex quibus apparet, captum ab  
hostibus etiam ex iniusta causā bellum  
geren-

gerentibus, fieri seruum. nam alioqui non esset opus fictionibus postliminij: sicut nec opus est, cum quis à latronibus captus fuit, cum non fuerit seruus<sup>a</sup>. Sufficit itaque, quod ad effectus iuris, & ut iura belli locum habeant, attinet, bellum geri ab iis, qui hostium numero sunt definiti, & belligerandi ius habent<sup>b</sup>. Quo sensu videtur defendi posse Alciati opinio<sup>c</sup>, & Fulgosij<sup>d</sup>: qui vtrinque

35 iustum\* bellum esse posse asserunt, contra receptam interpretum sententiam; quæ si ad iustam belli causam referatur, æquissima est. cum enim hostes contrarij sibi sint, contraria iura necesse est habeant: & vna eademque belli causa hinc inde iusta esse non potest. Ceterum cum

36 pecuniam\* neruum belli esse plerique existiment (quod spectat illud T. Quintij Flaminij, qui Philippomeni Achæorum prætori, multis equitibus, ac grauis armaturæ militibus instructo, pecuniæ autem inopi, illudens, manus eum dicebat habere & crura, sed ventre carere. nam & corporis eo habitu prætor erat<sup>e</sup>.)

37 quæri solet, cuius impensis\* bellum geri debeat, vtrum principis, an populi. Et quidem si Princeps reditus regales habeat

<sup>a</sup> L. qui a latronibus. D. de testam. L. postliminiū. §. a piratis. l. hostes. D. de capti. & post. reuer.

<sup>b</sup> Fulg. & Iaso. in l. ex hoc iure. D. de iust. & iur.

Petrus Anchoran. in regul. Peccatiū: col. 13. vers.

Tertio quero. Arctinus in l. qui a latroni.

D. de testam. Albericus de Rosa in l. cū eos populos.

col. 6. C. de sum. Trin. Abb. in c. ficut, de iurciu.

ran. quos allegat et sequitur Natta cō. fil. 284.

<sup>c</sup> In 2. parad. c. vii.

<sup>d</sup> In d. l. ex hoc iure.

<sup>e</sup> Plus, in apoph.

DE IVRE ET OFF. BELL.

habeat a ciuibus assignatos, certè ipsius principis impensis bellum geri debere

*a Angel. in l. turres. per illis text. C. de oper. public. La son. in l. diuortio. §. impensa. Et ibi Zasius, D. sol. matri. Guil. de Cuneo. Bald. Et Cyp. in l. neminem. C. de sacros. eccl. b offic. lib. 1.*

plerique existimant <sup>a</sup>. quod maximam rationem habet. omnes enim omnino principatus, regna, imperia ob publicam ipsorum ciuium vtilitatem, non ob eorum qui reipub. præsumt commodam, inducta esse, communi, frequentissimaque philosophorum, & legumlatorum sententia proditum est. Itaque Cicero <sup>b</sup>:

Omnino, inquit, qui reipubl. præsumt duo Platonis præcepta teneant. vnum, vt vtilitatem ciuium sic tueantur, vt quicquid agant, ad eam referant oblitum commodorum suorum. alterum, vt totum corpus reipubl. curent, ne cum partem aliquam tuentur, reliquas deserant, vt enim tutela, sic procuratio reipub. ad vtilitatem eorum, qui commissi sunt, non ad eorum quibus commissa est, gerenda est. Quam sententiam latè prosequitur

*c quest. illust. cap. 1. et sequ. d Bald. in l. si aliquis. D. de offic. procurat. Boerius in tract. de iust. cla.*

Ferdinand. Vazq. Si verò princeps idoneos redditus non habet, totius regni impensis bellum geri debet <sup>d</sup>. Neque hic certus tributum modus præscribi potest. nam vt Cleobulus belli dux, sociis Atheniensium in bello contra Philippum certam tributum summam definiri postulantis,

tibus,

tibus, respondit, bellum finiti non potest<sup>a</sup>. & huc facit, quòd ex sententia Catonis, in republ. bene constituta debet esse domi industria, agrarium opulètum, tenues res priuatæ: qui corruptissimis moribus vitium contrarium posuit, publicè egestatem, priuatim opulentiam, vnde luxu & desidia ciuitas facilè corrumpitur, vt ex Sallustio refert & probat D. August.<sup>b</sup> Meminisse tamen debent principes, modestissimi illius responsi Tiberij Cæsaris, qui thesaurariis onerandas tributo prouincias dicentibus, respondit, boni pastoris esse, rōdere pecus, & non deglubere. Memorabilis 38 quoque est Traiani \* sententia: qui correptus ab vxore Pōpeia Plotina, quòd calumniis suorum procuratorum prouinciæ diuexarētur, detestari coepit improbas exactiones, & insigni vsu est similitudine, fiscum appellans lienem. sicut enim, crescente in corporibus nostris liene, artus reliqui tabescunt: ita turgente principis fisco, marcescunt cetera reipub. membra, & grauitè ægrotant<sup>c</sup>. Ex superioribus deducitur, ciuem non teneri propriis sumptibus principem ad bellum sequi: sed stipèdium illi

<sup>a</sup> Plut. in vita Demost.

<sup>b</sup> de ciuit. Dei lib. 5. cap. 12.

<sup>c</sup> Sen. Aup. Vic. 113 luctus

a prin-

DE IVRE ET OFF. BELL.

*a* *Arct. in §. preiudiciales. instit. de actionib. Bart. in l. Mania. §. 1. per illud tex. D. de ann. le. gat. Oldra. consil. 234. Cas. in cōsuet. Borgwn. tit. de iust. §. 4. Boerius decif. 303*  
*b* *Reg. l. 3. et 5. tit. 19. par. 2.*  
*c* *Cesar de bello gall. l. 5*  
*d* *Argumento l. suo vultu. D. de oper. lib. Specul. in Tit. de sen. §. quoniam ver. 12*  
*Bald. in c. 1. quibus mod. feud. amit. Ludoni. Rom. in l. recusare. §. si quis alio. col. 1. et 2. D. ad S. G. Trib. c. Argu. l. 1. et ibi Angel. D. ad l. Rhodiā. de iact.*  
*f* *Argu. l. 2. §. si conseruatus. D. ad l. Rhod. de iact.*  
*g* *Reg. l. 4. tit. 23. par. 3.*

a principe vel repub. constitui debere<sup>a</sup>,  
 Si tamen maxima vrgeat necessitas, vt-  
 pote pro defensione regis, vel reipubl.  
 omnes tenentur ad hoc bellum concur-  
 rere, cuiuscunque sexus, vel conditionis  
 sint, grauibusque pœnise ex constitutio-  
 nibus regni Hispaniæ afficiuntur, qui  
 hoc bellum detrectauerint<sup>b</sup>. Quò spe-  
 ctat, quòd more Gallorum<sup>\*</sup>, initiū bel- 39  
 lorum erat armatum conciliū indicere,  
 quò lege communi omnes puberes ar-  
 mati conuenire consueuerant: & qui  
 ex his nouissimus conuenisset, in con-  
 spectu multitudinis omnibus cruciati-  
 bus affectus, necabatur<sup>c</sup>. Vassallus quo-  
 que feudatarius tenetur dominum suū  
 in bello iusto, etiam propriis sumptibus  
 iuuare<sup>d</sup>. Sed an dāna<sup>\*</sup>, in quæ quis belli 40  
 causa forte incidit, resarciri debeāt, que-  
 ri potest. Et certè, si quis pro defensione  
 reipub. sine stipendio ad bellum iuerit,  
 videtur damnum illi ex hac causa illatū  
 meritò repēdi debere<sup>e</sup>. at militi qui sti-  
 pendium meretur, non refunduntur  
 damna bello accepta<sup>f</sup>: nisi quòd ex con-  
 stitutionibus regni Hispaniæ ex præda  
 forte facta istiusmodi dāna resarciri so-  
 leant<sup>g</sup>. Et quidem ad iniustum bellum  
 voca-

vocatus, neque ad stipendia, neque ad  
damna refarcienda actionē habet. nam  
ex causa turpi nulla datur actio.<sup>a</sup>

a l. generali-  
ter, & l. seq.  
D. de verbo.  
oblig. L. si re-  
muerandi. §  
rei turpi. D.  
mād it. l. mo.  
in c. sicut, &  
infra de iure-  
iurand.

DE DVELLO SEV SINGVLARI  
CERTAMINE.

- 1 *Duellum quare prohibitum.*
- 2 *Duellum ex causa se factū illicitum.*
- 3 *Duelli vsus antiquissimus in Hispania.*
- 4 *Duellum fuit in vsu apud quosdam po-  
pulos.*
- 5 *Consuetudo duelli non valet.*
- 6 *Consuetudo duelli aliena a Græcorum &  
Romanor. institutis.*
- 7 *Duellum cum hoste licitum.*
- 8 *Dauid singulari pugna prostravit Go-  
liath.*
- 9 *Singulare certamen magni momenti in  
bello.*
- 10 *Duello non nūquam belli finis impositus.*
- 11 *De pugna Horatiorum cum Curiatjs.*
- 12 *Non esse tutum belli euentum duello re-  
dimere.*
- 13 *De Metio Suffetio.*

CAP. TERTIVM.

**D**Velli vsum vt detestabilem, & fa-  
bricante diabolo inductū, summa  
ratione sacri canones, & concilia patrū,

D variis

DE IVRE ET OFF. BELL.

variis censuris & pœnis, tam in eos qui decertant, quàm eos, quorū auctoritate, & consilio, atque etiam præsentia istiusmodi certamina ineūtur, statutis exterminandum & abolendum esse censue-

*a c monomachiam. 2. q. 4. c. 1. et toto tit. de purg. vul. & tit. de cler. in duel. pug. et cōcul. Triden. sess. 19.* runt <sup>a</sup>. quòd scilicet <sup>\*</sup> hoc genere certaminis ordo iudiciorum, & legū omnis auctoritas, quæ actiones constituit, quibus vnique ius suum in iudicio prosequi licet, peruertatur: & iniquum sit, vt quis auctoritate propria sibi ius dicat <sup>b</sup>.

*b L. existat. D. quod met. caus. c. l. 1. D. de iur. & iur.* ideo enim latæ sunt leges, & creati magistratus, vt licitū ab illicito discernant, & ius suum cuique tribuant <sup>c</sup>. tum etiam quòd hac decertandi ratione ipsa iusticia violetur. nā quàm plurimi, quorum causa iure & æquitate optima erat, stolidissimi deorum Martis arbitrio pug-

*d c. significatibus. de purg. vul.* gnantes occubuere <sup>d</sup>. præterea quòd Deus tentari non debeat: quod fit, cum ad manifestationem veritatis, vt plerun-

*e d. c. monomachiam. c. porro. de Cle. in duel. pug.* que fit, duellum initur <sup>e</sup>. denique cum homicidiū diuino & humano iure prohibeatur, duellum, per quod plerunque ad homicidium deuenitur, esse prohibitum etiam dicendum est. cum enim aliquid prohibetur, prohibitum etiam censetur omne id, per quod eò deuenitur.

- 2 tura. Sunt tamen\* qui existimēt, ex causa  
 læsæ famæ hoc genus pugnæ iniri posse:  
 Quia, inquit, crudelis est, qui negligit  
 famam suam<sup>b</sup>. fama enim cōmodo præ-  
 ferenda est<sup>c</sup>, & vitæ æquiparatur<sup>d</sup>. sed  
 eorum sententiam non probo. idcirco  
 enim, vt inquit Imperator<sup>e</sup>, iudiciorum  
 vigor, iurisque publici tutela est in me-  
 dio cōstituta, ne quisquam sibi ipsi per-  
 mittere valeat vltionem. & non potest  
 dici honoris sui prodigus, vel negligēs,  
 qui suam, suorumue iniuriam auctori-  
 3 tate iudicis persequitur. Porrò constat\*  
 hoc genus pugnæ, tam ad ostentationē  
 virtutis, quàm ad cōtrouersias deciden-  
 das, antiquissimum fuisse, præsertim in  
 Hispania. nam cū Scipio Carthaginē  
 nouam, ad vota soluenda diis, munusq;  
 gladiatorum, quod mortis causa patris,  
 patruique parauerat, rediisset, spectacu-  
 4 lū, inquit Liuius<sup>f</sup>, fuit non ex eo genere  
 5 hominum, ex quo lanistis comparare  
 6 mos est, seruorum delectu ac libertorū,  
 7 qui venalem sanguinem habent: volun-  
 8 taria omnis & gratuita opera pugnan-  
 9 tium fuit. nam alij missi a regulis sunt, ad  
 10 specimen insitæ genti virtutis ostentan-  
 11 dum: alij, ipsi professi se pugnatu-  
 12 ros in gratiam

a Argumento  
l. oratio, D. de  
spons.

b Bald. in c.  
1 col. 5. de  
pace tenend.  
Cagn. Decius  
Curt. sen.

c Curt. inu. &  
alii, quos re-  
fert Ferdinā.  
Vazq. quest.  
illust. sb. 1. c.

49  
d l. iud. inu.  
D. si qui u-  
mis. cau. test.  
d. iusta cau-  
sa. D. de ma-  
nu. vnd.  
e in l. n. ius.  
C. de iud.

f lib. 8.

DE IVRE ET OFF. BELL.

gratiam ducis : alios æmulatio ad certa-  
men, vt prouocarent, prouocatiq; haud  
abnuerent, traxit: quidã quas disceptan-  
do controuersias finire nequiuerãt, aut  
noluerant, pacti inter se, vt victorem res  
sequeretur, ferro decreuerunt. nec ob-  
scuri generis homines, sed clari, illustres-  
que Corbis & Orsua patruales fratres,  
de principatu ciuitatis, quã Ibẽ vocant,  
ambigentes, ferro se decertaturos pro-  
fessi sunt. Corbis maior etate erat. Orsue  
pater princeps proximẽ fuerat, a fratre  
maiore post mortẽ eius principatu ac-  
cepto. cum verbis Scipio disceptare vel-  
let, ac sedare iras, negatum id ambo di-  
cere communibus cognatis, nec alium  
deorum hominũue, quã Martem se  
iudicem habituros : robore maior ; mi-  
nor flore etatis, ferox. mortem in certa-  
mine, quã alter alterius imperio subij-  
ceretur, præoptantes. Cum ab tanta ra-  
bie dirimi nequirent, insigne spectaculũ  
exercitui præbuere, documentumque,  
quantũ cupiditas imperij malum inter  
mortales esset. Maior vsu armorum, &  
astu facilẽ stolidas vires minoris supera-  
uit. hætenus Liuius. Et hæc quidem de-  
certandi ratio \*, etiam posterioribus tẽ-  
poribus,

poribus, ad lites dirimendas, certis casibus, & legibus apud Hispanos (quãuis eandem iniquissimã scirent<sup>a</sup>) permissa fuit<sup>b</sup>. Apud Longobardos quoq; moribus receptum fuit, vt quoties coram iudice defectus quispiam esset, aliquidque ad plenam intentionis fidem iudici faciendam deesset, duello certis casibus controuersia definiretur<sup>c</sup>. Constituit & Fredericus Ænobarbus imperator, vt aliquando duello res decideretur<sup>d</sup>. Neq; a Longobardorum legibus Gallorum consuetudo multum dissidet, vt liquet ex eorum legibus, quas Salicas vocant. & exstat apud eos quoque hæc Philippi

» constitutio: Si quis occulti criminis, capitalisque reus sit, atque ita de eo constet, vt quæstioni subijci possit, condemnari non possit: is, arbitrato accusatoris, duello experiatur. cuius constitutionis meminit Ioann. Faber<sup>e</sup>: eamque refert Guido Papæ<sup>f</sup>: qui adducit quoque, & interpretatur aliam quandam constitutionem imperialem de modo duelli, & qua ratione iudici debeat g. Solet quoq; hæc consuetudo duelli admodum frequens esse in Italia, præsertim pro conseruatione honoris<sup>h</sup>. Vnde multi hanc

<sup>a</sup> Reg. lib. 8.

tit. 14. par. 3.

<sup>b</sup> Tit. 4. de

litis lites par.

7.

<sup>c</sup> in ll. long.

tit qual. quis

se defen. deb.

et tit. de purg.

rei, et tit. de

hom. lib hom.

d c. 1. de pa-

cerenem. §. si

quis hominē,

et §. si miles.

in vsib. feud.

<sup>e</sup> in §. per

cōtrarium in-

stit. de hered.

qua ab intest.

§. decis. 617.

<sup>g</sup> Decis. 198

<sup>h</sup> Decis. cons-

ci. 97. Curt.

Im conc. 173

Curt. sent. in

repetitio. l.

admonēdi. D.

de iur. iuran.

Cagnol et a-

lij quos refert

Ferd. Vazq.

quæst. in iur.

lib. 1. cap. 40.

DE IVRE ET OFF. BELL.

rem anxie tractauerunt. vtpote quibus de causis duellum inire liceat : vter pro- uocatoris, vel prouocati vices sustineat: qui ad duellum admittantur: quando de- tractari duellum possit : quando optio- nem, quem vulgo campionem vocant, dare concessum sit: de electione armorū & loci : de iuramento calumniæ a pug- nantibus præstando: & sic de ceteris cō- trouersis, quæ in hoc genere pugne in- cidere solent. Non ignorauerunt tamen viri doctissimi hanc consuetudinē, quip- pe iuri contrariam, non\* valere<sup>a</sup>: præfer- 5 tim cū expressè iure canonico sit pro- hibita, cui standum est in vtroque foro, cū agitur de peccato<sup>b</sup>. sed quia de fa- cto seruari solet, perinde de huiusmodi corruptela disputauere, atque si valeret: quia quæ factō fiunt, quādoque ad cau- sam iuris trahuntur<sup>c</sup>. Et quidem con- 6 suetudo ista\*, inter ciues, socios & com- miliones singulari pugna cōtrouersias decidendi, non solum a Christianis in- stitutis abhorret: sed etiam plurimū abfuit a veteri tum Græcorum, tum Ro- manorum disciplina; qui turpissimum censebant, belli socios, quos oportet o- pe mutua causam comunē defendere, stulta,

<sup>a</sup> l. 2. C. que sit long. ten. consue. l. non dubium. C. de legibus. b c. nonit de iud. c. 1. & 2. de non oper. nunc.

<sup>c</sup> l. mulier. §. 1. D. de cond. iust. l. qui ha- bebant. D. de man. testa. Alexan. con- cil. 107. col. 6

stulta, vt sæpe fit, ac pernicioſa ambitio-  
 ne, pugnare, aut velle ſuas priuatas con-  
 trouerſias ferro potius dirimi, quàm  
 communibus legibus diiudicari. quod  
 a ratione admodum alienum eſt. non  
 ſecùs quàm ſi duo Philoſophi, aut Iure-  
 conſulti inter ſe, vter doctior ſit, gladiis  
 decertent. Neque enim de omnibus in-  
 iuſticiæ generibus vllũ turpius aut ma-  
 ius eſſe poteſt, quàm vt imbecillis ac te-  
 nuis, accepta iniuria, ſit infamia dignus,  
 niſi cum aduerſario, quãtuncunque vi-  
 ribus præſtet, armis decertauerit, ac vitã  
 periculis obiecerit: præſertim cùm na-  
 tura ſic cõparatum ſit, vt qui minimum  
 rationis, plurimum roboris habeant, vt  
 de Scythiſ refert Bodinus<sup>a</sup>. Qua certè  
 ratione etiam fortiſſimi viri, ſi cum bel-  
 luis, quæ robore præſtant, conferantur,  
 iure infames ſint. prius itaq; omnia ex-  
 periri, quàm armis decertare ſapientem  
 7 decet. Ceterum qui hoc genus\* pugnæ  
 non cauſã vindictæ, aut priuati odij, ſed  
 pro bono publico ſubeunt, extra culpã  
 ſunt: cùm etiam laudem mereantur<sup>b</sup>.  
 Itaque ſi quis iuſſu, vel ſaltem conſenſu  
 ducis (cùm alioqui extra ordinem pug-  
 nare non liceat) cum hoſte publico, ſin-

<sup>a</sup> in metbo.  
hiſt. c. 5.

<sup>b</sup> l. 1. §. qui  
operas. D. de  
põſtõ. Hæro.  
Cagnol. in l.  
favorabili-  
ris D. de reg-  
ur.

DE IVRE ET OFF. BELL.

gulari certamine congregiatur, non solum non peccat in leges, & statuta Pontificum, sed exemplo Torquati, Coru-  
nij, Marcelli, Scipionis, Æmiliani & aliorum, maximam inde gloriam referre debet. eadem enim ratio quæ bellum iustum admittit: in quo pro patriæ, ve ecclesiæ defensione mori gloriosissimum est<sup>a</sup>: hæc quoque certamina licita esse ostendit, nam cum hoste pugnare vtcunque in bello, nõ est tentare Deum, quod lex diuina vetat, nec hostem tollere, est homicidium patrare, naturæ lege prohibitur; sed officio fungi boni militis<sup>b</sup>. Vnde non minus\* licuit Dauidi Philistæum Goliath singulari pugna proster-  
nere, quàm si hoc idem conferto multorum prælio fecisset<sup>c</sup>. Et certè hæc pugna\*, non parum sæpe ad totius belli euentum faciunt. Itaque Liuius<sup>d</sup> de pugna illa Torquati cum Gallo tractans: Tanti, inquit, ea dimicatio ad vniuersi belli euentum momenti fuit, vt Gallorum exercitus relictis trepidè castris, in Tiburtem agrum, mox in Campaniam trāsierit. Similiter bello sociali, cum ingens Gallus ex Gallicis auxiliis, quæ L. Cluentius cum Sylla decertaturus assumpt-

a c. omni timore. 23. q. 8  
c. omniu. 23.  
q. 5. Reg. Inf.  
lib. 3. tit. 25,  
par. 2.

b c. miles. c.  
homicidium. 23  
quest. 5.

c Reg. 1. c. 17

d lib. 5.

sumperat, procurrens, inuitasset ad singulare certamen, ex Romanis aliquem, & eum parue staturæ Numida confecisset: territi Galli confestim terga vertunt: iamque turbata acie, nec alij Cluetiani perstiterunt, sed Nolam per fugerunt trepidè<sup>a</sup>. Committuntur<sup>a</sup> quoque nonnunquam istiusmodi certamina, a summis principibus: vel ab vno, aut pluribus hinc inde a principibus pari numero electis, quorum euentus bello finem imponat. quod olim à Tullo Hostilio Romanorum rege, & Metio Sufetio rege Albanorum factum fuisse legimus. quum enim pari robore frequentibus præliis vtrinq; comminuerentur, misso in compedium bello, vt inquit L. Florus<sup>b</sup>, Horatiis<sup>c</sup>, Curiatisque, triginis hinc atque inde fratribus, vtriusque fata commissa sunt, solemnè prius foedere inter vtrumque regem, & vtriusque populū percusso, & legibus dictis, quibus victi victoribus dederentur<sup>c</sup>. Quod genus pugnæ non quidem illicitum esse censeo: nam & D. Thomas<sup>d</sup>, æquans duellum iudicio sortis, illicitum quidem esse dicit, si fiat ad probationē, vel reuelationem rei occultæ: nō autem

<sup>a</sup> Appian. de bell. ciuili. l. 1.

<sup>b</sup> lib. 1. c. 3.

<sup>c</sup> Linius l. 1.

<sup>d</sup> 2. 2. quæst. 85. art. 8.

DE IVRE ET OFF. BELL.

si fiat ad diuisionem rerum, vel contro-  
uersiæ definitionem: quale fuit certamē  
Dauidis cum Philistæo, quod approba-  
tum fuit Deo . quod equidem admittō  
inter summos principes: vel eorum au-  
ctoritate, qui belli gerendi ius habent,  
vt scilicet bellorum calamitates vitētur.  
Quo casu etiam a Romanis pōtificibus  
nonnunquam duellum cōcessum fuisse  
legimus. itaque Carolus Andegauen-  
sis, & Petrus Tarraconensis, cū de Si-  
cilia diu bellum gessissent, auctoritate  
Martini pontif. singulari certamine cō-  
trouersiam finire decreuerunt<sup>a</sup>. Sed hāc  
rationē controuersias decidendi \* (cū 12  
valdē temerarium sit, summam rerum  
periculo vnus, aut alterius cōmittere)  
non omnino tutam, neque etiam sem-  
per bello finē imponere existimo. quod  
euentus pugnæ trigeminorum satis o-  
stendit, nam Metius Suffetius \*, fortunā 13  
& euentum totius belli, & virtutem sui  
exercitus fortunæ aut virtuti Cuiatio-  
rum committendo, regnum & libertatē  
tam propriam, quā suorum, pro qua  
tuenda multis annis contenderant, mo-  
mento amisit; & Romanis fortunæ arbi-  
trio (cui temerē se subiecerant) victori-  
bus,

<sup>a</sup> Vide Prof-  
sard, lib. 1.

bus, non omnino tuta victoria fuit. nam quamuis Metius Suffetius victus, protinus se suaque omnia submitteret Romanis: postea tamē in expeditione Venientana, expectata occasione, suæ temeritatis pœnitens, Romanum exercitum prodere conatus est <sup>a</sup>. Quare vbi de omnium salute & libertate, vel de tota possessione agitur, non nisi totis viribus cōtendendum est. alias enim non solum victus temeritatem suam inculcabit, sed nec victor omnino securus erit. eius enim animus, vt inquit Liuius, in perpetuum vincitur, cui confessio expressa sit, se neq; arte, neque casu, sed totis viribus cominus collatis, iusto ac pio bello superatum esse. Neque credi potest, vllum populum aut hominem denique (vt senatus Romanorum in causa Priuernatium sensit) in ea conditione, cuius eum pœniteat, diutius quàm necesse sit mansurum <sup>b</sup>.

<sup>a</sup> Liuius li. 1

<sup>b</sup> Liuius li. 8.

DE PIGNERATIONIBVS, QVAS  
REPRESALIAS VOCANT.

- 1 *Pignerandi potestas antiquissima cōsuetudine permessa.*
- 2 *Pigneraciones quomodo hodie permittuntur.*

3 *Con-*

DE IVRE ET OFF. BELL.

- 3 *Consuetudo pignerandi an iure probata sit.*
- 4 *Nonnunquam ex causa etiam sine culpa quem puniri.*
- 5 *Etiam sine culpa potest quis affici pœna bonorum; non etiam pœna corporali.*
- 6 *Pignerationes ad offensionem personarum innocentium illicitæ.*
- 7 *D. Ambrosius Theodosium imper. increpuit.*
- 8 *Ex qua causa sit condita l. vindicari, C. de pœn.*
- 9 *In pignerationibus innocentes ex accidenti occidi possunt.*
- 10 *Pignerationes non alio modo licitæ quàm quo bellum.*

CAP. QVARTVM.

**P**ignerandi potestatem\*, quam Græci **1**  
Androlepsiam vocant, antiquissima  
consuetudine permissam fuisse constat.  
moris enim fuit antiquissimi, vt qui ho-  
miciidium perpetrassent, si cùm in ex-  
ternam vrbem profugissent, ad pœnam  
exosciti non dederentur iis, ad quos  
facinus admissum pertinebat, ipsis vt  
permitteretur pignerandi potestas. sic **22**  
enim sancitum fuisse legimus: si quis vio- **22**  
lenta morte obierit, pro hoc gentilibus **22**  
& co-

1) & cognatis Androlepsiæ sunt, quoad  
 2) iudicium cedis, pœnasque subierint, vel  
 3) necis auctores dediderint. androlepsia  
 4) verò ad tres vsque, nec eo amplius esto.

Quæ verba referuntur a Demosthene  
 in oratione in Aristogitonem, qui istic  
 defendit, causæ fortasse inseruiens, An-  
 drolepsiam lege esse permissam, non cõ-  
 tra profugũ suscipientes, sed contra eos  
 demum, apud quos cædes facta fuisset.  
 Julius verò Pollux eam permissam fuis-  
 se scribit, etiam contra eos, qui homici-  
 dam profugum suscepissent, nec eum  
 petentibus dedidissent, nec ad criminis  
 pœnam, nec ad vindictam: nec ipsi iustè  
 punirent: vt annotauit Budæus<sup>a</sup>. Ad a in l. aut fa-  
 cta. §. euen-  
 tus. D. de pœ.

2 hunc sanè modum \* pignerationes hæ,  
 quas reprefalias vocant, hodie permit-  
 tuntur, vt si qua ex gente latrones, aut  
 piratæ, vel quicumque alij homicidia, a-  
 liâue scelera perpetrauerint, iniuriam  
 damnũmue intulerint: nec eam passim  
 potuerint obtinere ab iis, quibus scele-  
 rum auctores subiiciuntur, vel qui eos  
 susceperint, vt iidem dedantur, vel pœ-  
 nas luant, tunc liceat vti pignerationi-  
 3 bus. Sed vtrũ hæc consuetudo \* iure  
 defendi possit, controuersum est: præ-  
 sertim

DE IVRE ET OFF. BELL.

*a c. Iudei. c. Iam itaque. 1. quest. 4. l. crimen. D. de poen. Aug. 9. 8. super l. sive. l. I. famulus. C. de poen. c. 2. de constitut. c. qua sunt. d. hic que si. a ma p. r. cap. Romana, in si. de sent. excommunicat. lege 12. l. ad. C. de leg. here. c. Exod. 23. d. Ezech. 18. e. Deut. c. 24. f. c. quoniam frequenter. §. si vero ut lite non cōtest. c. renouantes, et ibi gloss. 22. dist. cap. anti. quo. de preul. c. vergēis, c. nec huiusmodi, de heret. gloss. in c. 2. de constit. Et est elegās text. in c. eccle. 1. q. 4. g. cap. 21. h. Leu. c. 20. i. c. mulier. 15. quest. 1. k. Reg. 2. c. 12. l. Genes. c. 19.*

fertim ex eo, quòd iniquum sit, & a iusticia alienū, ob alterius culpam & crimen innocenti pœnam infligi <sup>a</sup>. nam pœna sequitur criminis auctorē <sup>b</sup>. Scriptum est, in fontem & iustum non occides <sup>c</sup>. & anima quæ peccauerit, ipsa morietur. filius non portabit iniquitatem patris, & pater non portabit iniquitatē filij. iusticia iusti super eum erit, & impietas impij super eum <sup>d</sup>. & non occidentur patres pro filiis, nec filij pro parentibus; sed vnusquisque pro peccato suo morietur <sup>e</sup>. Nihilominus tamen, quandoque ex causā <sup>\*</sup>, etiam si culpa ab- <sup>4.</sup> sit, quem puniri posse constat <sup>f</sup>. Quò spectat lex illa Exodi g: Si animal hominē occiderit, lapidibus obruatur. quod & lege Draconis, legislatoris Atheniēsis cautum fuit. Similiter pecus licet ratione careat, & a culpa immune sit, cū ipsa foemina, quæ se ei commiscuit, suspendi iubetur <sup>h</sup>. ne tali flagitio contaminatum indignam refricet facti memoriā <sup>i</sup>. Præterea puer natus Dauidi ex illicito coitu, ob parentis crimen a Deo extinctus est <sup>k</sup>. & infantes Sodomæ absq; vllò proprio peccato, simul cū adultis peccatoribus igne consumpti sunt <sup>l</sup>. vnde Deus ipse

ipſe ait : Ego ſum Deus zelotes, viſitans iniquitatē patrū in filios, vſq; ad tertiam & quartā generationē<sup>a</sup>. Quæ quidē diuina iudicia quāuis hominibus imitari non liceat, niſi quatenus ex manifeſtis cauſis procedūt; ideoq; nulla lege<sup>\*</sup>, quacunq; ex cauſa, quis debeat corporali pœna affici ob alterius crimen<sup>b</sup>: (quæ de cauſa etiā iniquè ab Arcadio & Honorio imp̄p.<sup>c</sup> dictum cenſet Couarruias<sup>d</sup>, ex imperatoria lenitate, & indulgentia ſe vitam concedere filiis eorum, qui crimen læſæ maiestatis commiſerāt: cum nullo iure illis vitam adimere poſſent) tamen ex cauſis, & propter reipub. vtilitatem; quoq; magis homines a delictis compescantur, humana lex poterit pœna pecuniaria, publicatione bonorum, vel ſimili, punire etiā illos, qui non deliquerunt: & ita paſſim legibus & canonibus ſtatutum eſt: præſertim in filiis & nepotibus eorum, qui crimen læſæ maiestatis diuinæ vel humanæ commiſerunt: qui afficiuntur infamia, & plectuntur publicatione bonorum<sup>e</sup>. quod præclarè legibus comparatum eſſe dicit Cicero<sup>f</sup>; vt charitas liberorum amiciores parentes redderet reipub. quam ſententiam

<sup>a</sup> Exod. c. 20

<sup>b</sup> Auguſt. q. 8. ſuper Iofue. Thom. Card. et alij reſol. e. Conarruias. var. reſol. lib. 2. c. 8. <sup>c</sup> in l. quiſquis. C. ad l. lul. maiest. <sup>d</sup> var. reſol. lib. 2. c. 8.

<sup>e</sup> d. l. quiſquis cum ſimilib.

<sup>f</sup> in epiſt. ad Brutum.

DE IVRE ET OFF. BELL.

a *variar. re-  
sul. lib. 2 c. 8.*  
b *q. 10 super  
Iosep, c. Do-  
minus, 23 q. 2  
c. 1. de iur. ius.  
in 6. & ibi  
Anch. Dom.  
et Franc. iac.  
de Camb. &  
Bart. in trac.  
de represa.  
Sal. in authē.  
omnino. C. de  
act. & oblig.  
Inno. in c. o-  
lun, de rest. t.  
spoliat. iacob.  
de Bellou in  
auth. ut non  
fiant pign.  
c. 10. Papon.  
in arrest. l. 5.  
tit. 3. nu. 2.  
d. l. liber ho-  
mo. D. ad l.  
Aquil. c. con-  
tingit. de sent.  
excom. Gloss.  
in sig. in cap.  
cum homo.  
23. quest. 5.  
c. Gloss. ele-  
gans, in Rub.  
C. de decret.  
decu. lib. 10  
quā glossam*

tentiam ex D. Augustino & aliis, latè  
prosequitur & discutit Couarruias a.  
Ex quibus, ni fallor, manifestum est \*, 6  
pignerationes istas licitas quidē esse (vt  
communi omnium consensu deducitur  
ex D. Augustino b,) sed non quoad of-  
fensionem personarum innocētium, &  
qui nullam illati damni culpam contra-  
xerunt ; verū bonorum tantum c.  
Quemadmodum enim quis solo con-  
sensu se potest subijcere damno bono-  
rum, non autem membrorum, vel corpo-  
ris d: sic quoque lege vel statuto, cui  
vnusquisque cōsentire præsumitur, po-  
test quis ex causa, licet sine culpa, affici  
pœna pecuniaria, nō etiam corporali e.  
Quare iustissimè D. Ambrosius\* Theo- 7  
dosium imperatorem increpuit, quòd  
milite quodam in tumultu occiso, iussit  
populum, vt quisque obuius esset, cædi.  
potuit enim imperator militis occiso-  
res capite punire: iniquè verò, etiam ex  
causa seditionis, innocentes occidi ius-  
sit. pro quo delicto culpam cum lacry-  
mis professus imperator, publicam pœ-  
nitentiam

passim sequuntur interpp. & commendat Bald. in l. un. C. ne filius  
pro pat. Alex. in l. sape, num. 10. D. de re iud. Ange. & las. in §.  
actiones, nu. 68. instit. de actio.  
f. c. cum apud Thessalonicā, 11. q. 3, D. Aug. de ciuit. Dei, 5. c. 26.

nitentiam in totius conspectu ecclesiæ  
 8 egit: & lege cauit\*, vt si princeps ex ira-  
 cūdiā quem seuerius puniri iubeat: sen-  
 tentia ad triginta dies suspēdatur<sup>a</sup>. Ce-  
 9 terum quemadmodum in bello\* non  
 licet ex professo innocētes occidere, sē  
 minas scilicet, nec infantes: (licet tamē  
 ex accidenti, si puta oppidum machinis,  
 vel tormentis bellicis concutiatur, cum  
 aliter bellum geri non possit.) sic quoq;  
 in hisce pignerationibus, quamuis in-  
 noxij offendi non possint, sed tantūm  
 bona eorum capere liceat: permittit ta-  
 men conditio rei, vt ex accidenti occi-  
 dantur: siquidem aliter pignerationes  
 istæ exerceri non possunt. Sciendū verò  
 10 \*pignerationes istas non alio modo esse  
 licitas, quā quo bellū iure diuino, na-  
 turali & ciuili licitum censetur. vnde  
 omnino requiritur auctoritas summi  
 Principis, qui belli indicēdi ius habet<sup>b</sup>.  
 a iudice autem concedi non possunt, &  
 inter ciues locum non habent<sup>c</sup>. quam-  
 uis olim apud Atheniēses priuato con-  
 silio androlepsiā exercere liceret: multa  
 tamen constituta non iure ea vtenti; vt  
 ex Polluce annotauit Bud<sup>d</sup>. Itaque &  
 hodie iusta causa subesse debet. Nempe,  
 E quod

<sup>a</sup> in l. vindi-  
 cari. C. de per.  
 d. cap. Cum  
 apud Thessa-  
 lonicam.

<sup>b</sup> c. Dominus  
 noster. 23.  
 quest 2.  
<sup>c</sup> Auth. vt  
 nu. l. sud. l. c. §  
 quoniam, &  
 Au. he. vt nū  
 fia. pign.

<sup>d</sup> in l. aut fa.  
 Etz. §. euen-  
 tus. D. de per.

DE IVRE ET OFF. BELL.

quod ille populus, contra quem pignerationes istæ conceduntur, vindicare neglexerit, quod a suis improbè factum est. alioqui verò, si iusta & vera causa desit, concessio pignerandi nullius erit momenti.

a l. cum vero. §. subventum. D. de fid. commiss. lib. l. 1. §. hac verba. D. ne via fiat qui

DE BELLO CAPTIS ET IVRE  
POSTLIMINII.

- 1 *Iusto bello capta sunt capientium.*
- 2 *Alciati opinio reprobata, qui dicit omnia bella hodie esse civilia.*
- 3 *Differentia inter res mobiles & immobiles bello captas.*
- 4 *Præda omnis arbitrio ducis est, non militum.*
- 5 *Imperatores prædam nonnunquam in ærarium inferre soliti.*
- 6 *Nonnunquam militibus dividere.*
- 7 *Præda pars debetur etiã iis, qui non fuerunt in prælio.*
- 8 *Præda militibus nonnunquam edici solet, & eorum arbitrio permitti.*
- 9 *Principi & duci debetur sua portio ex præda.*
- 10 *Romani partem præda diis vouere soliti.*
- 11 *Non nisi deuietis hostibus & signodato, ad prædam discurrendum.*

- 12 *In diuisione præde fraudem committens puniendus.*
- 13 *Fugienti in bello non debetur pars præde.*
- 14 *Lubendi sunt milites prædam vendere, ne impedimentis grauentur.*
- 15 *Res sacra non cedunt præde.*
- 16 *Natura ne, an instituto hominum seruitus sit inducta.*
- 17 *Seruitus non tollit libertatem naturalem.*
- 18 *Nulla vis quæ facti est, seruitutem inducit, qua iuris est.*
- 19 *Capti hodie inter Christianos non sunt serui, nisi militent infidelibus.*
- 20 *In bello captus, & ad suos reuersus pristinam libertatem recipit.*
- 21 *Nisi iurauerit se rediturum ad hostes.*
- 22 *Transfuga non habet postliminium, nisi sit seruus.*
- 23 *Qui se hostibus dedunt, non habent ius postliminii, licet armis victi sint.*
- 24 *Controuersia inter veteres in causa Mancini.*
- 25 *In bello etiam mulieres capi possunt & pueri.*
- 26 *Iusto bello captus, tenetur ad precium redemptionis, quod promisit.*
- 27 *Captiui cuius sint.*

DE IVRE ET OFF. BELL.

- 28 *Privata auctoritate non licet captivum occidere.*
- 29 *Precium conventionis, de quo convenit, non debet augeri.*
- 30 *Qui pro captivo solvit precium redemptionis, quæ remedia habeat.*
- 31 *Redemptio captivorum favorabilis.*
- 32 *Negligens redimere captivum.*
- 33 *Agri redeunt postliminio.*
- 34 *Quæ præterea redeant postliminio.*
- 35 *Res semel ab hostibus capta, & ab iisdem recuperata, an sint restituenda priori Domino.*
- 36 *Res quæ sunt hostium, non sunt in commercio, nisi sint eius generis, quæ postliminio redire possunt.*
- 37 *Præda quando sit facta hostium.*
- 38 *Capta a piratis non sunt eorum: ideòque recuperata, priori domino restituenda sunt:*
- 39 *Licet aliud constitutionibus regni Hispaniæ statutum sit.*
- 40 *Res furtiva bello capta, an priori domino restitui debeat.*
- 41 *Res incorporales, an bello capi possint.*
- 42 *Quæstio inter Thebanos & Thessalos.*
- 43 *Universitas non perit, quamdiu unus superest.*

PRimum iusticiæ munus est, vt inquit Cicero<sup>a</sup>, vt ne cui quis noceat, nisi la-  
a off. lib. 1.  
cessitus iniuria. quæ causa est etiam iusti  
belli fundamentum, vt superius latè o-  
stendimus<sup>b</sup>. Quam Ciceronis senten-  
b 3. c. 2.  
tiam quamuis refutet Lactantius<sup>c</sup>; vt  
c lib. 6. c. 12.  
quæ duorum verborum adiectione cor-  
rupta sit: nō enim addi debuisse, nisi la-  
cessitus iniuria: Socratem secutus: qui  
dicebat vltionem esse iniustam, eo quod  
malum inferre iniustum sit: summū ta-  
men principem, qui non ex animi mor-  
bo, sed ex amore iusti, vt hostiū impro-  
bitatem coerceat, & suos defendat, ac-  
ceptam iniuriam bello vindicat, extra  
culpam esse omnino dicendum est. non  
enim est iniuria, vt inquit Seneca, pati  
I quod prior feceris. Vnde dominiū<sup>e</sup> eo-  
rum, quæ iusto bello capimus, in nos  
transfertur: est que hic iustus modus ac-  
quirendi dominiij<sup>d</sup>. quod & Cicero in-  
dicat, cum ait: Sunt autem priuata nulla  
,, natura, sed aut veteri occupatione, vt  
,, qui quondam in vacua venerunt: aut vi-  
,, ctoria, vt qui bello potiti sunt; aut lege,  
,, aut pactione, conditione, forte<sup>e</sup>: idque  
iure gentium inductum est<sup>f</sup>, & iure di-  
d §. Item ea que ab h. h. i. bus. in d. it. de rer. diuis. e offic. lib. 1. f l. ex hoc iur. de. D. de iust. & iur. c. iur. r. i. s. e. m. i. u. m. dist. 1.

DE IVRE ET OFF. BELL.

*a Reg. 1. c. 30*  
*b d. c. iurif-*  
*getium, & c.*  
*omn. mutare.*  
*dist. 1. & c.*  
*duat. 23 q. 5*  
*c. sicut & in*  
*fra de iure iur.*  
*c. d. §. item*  
*ea que ab ba-*  
*stibus. l. si*  
*quid bello. D.*  
*de captiv. l.*  
*naturalem. §.*  
*de l. transf-*  
*fugam. D. de*  
*acq. rer. dom.*  
*d. in l. hostes.*  
*D. de verbor.*  
*signif.*  
*e l. in orbe.*  
*D. de statu*  
*hominum.*  
*f c. ad men-*  
*sam. 11. q. 3*

uino<sup>a</sup>, canonico<sup>b</sup>, & ciuili comproba-  
 tum<sup>c</sup>. Cuius iuris æquitas, non tam ad  
 satisfaciendum ei qui iniuriam accepit,  
 quàm ad coërcendam improbitatē eo-  
 rum, qui iniusta bella gerunt, spectare  
 videtur: vt ex D. Augustino in præfatio-  
 ne huius operis dictum est. Neque Al-  
 ciato<sup>d</sup> assentior<sup>d</sup>, qui bello inter Chri-  
 stianos capta, non fieri capientium, hoc  
 argumento probare conatur: quòd sci-  
 licet omnes, qui in orbe Romano erāt,  
 Antonini constitutione ciues Romani  
 effecti sint<sup>e</sup>. vnde hodie omnes Chri-  
 stianos, populum Romanum esse, &  
 Christi lege fratres<sup>f</sup>: ideoque quę inter  
 eos mouentur bella, plus quàm ciuilia  
 esse: & per consequens, ius belli, quo ca-  
 pta fiunt capientium, inter Christianos,  
 locum non habere<sup>g</sup>. Quod si verum ef-  
 fet, nullum iustum bellū inter Christia-  
 nos esse posset. quod falsum esse, ex iis  
 quę alio loco diximus<sup>h</sup>, satis constat. vnde  
 & capta hoc bello fient capientium.  
 nisi quòd antiquissima cōsuetudine in-  
 troducū est inter Christianos, vt capti  
 vtcunque iusto bello, libertatem non a-  
 mitterent. de quo mox dicemus. Neque  
 ciuile bellū dici potest, quod inter duos  
 summos

summos principes, aut populos liberos geritur. non enim sunt ciues, qui non iisdem imperiis, ac iussis tenentur <sup>a</sup>, sed et si cum subditis, & ciuibus rebellibus sit bellum, non protinus cessabunt iura belli, quibus dominiū eorū, quæ ab hostibus capimus, nobis acquirimus. nam qui hostili animo contra imperij maiestatem quid machinatur, ex ciue fit hostis <sup>b</sup>. Itaq; multis rationibus docet Cicero, iustū esse bellū q̄ inferretur Antonio, hosti reipub. iniustū verò quod ipse Antonius gerebat: ideoq; iura belli, quæ hostibus tantū conueniunt, ipsi non conucnire <sup>c</sup>. quæ de re alibi latiùs tractauimus <sup>d</sup>: quæ huc referrī possunt. Porro

3 illud quidē verum <sup>e</sup> est, dominium rerū iusto bello captarū, in victorē trāsferrī: sed distinctione facta inter res mobiles, & immobiles. immobilia enim, vtpote agri, publicātur <sup>f</sup>. quāuis olim nō semel agros bello captos, militibus ob bene nauatā operā diuisos fuisse legimus <sup>g</sup>. idque a Romulo institutū fuit <sup>g</sup>. Alexāder autē Seuerus agros captos ab hostibus, limitaneis ducibus, ac militibus donauit: ita vt eorū essent, si heredes quoque militarēt, neq; ad priuatos trāferrentur:

<sup>a</sup> Latè Bodin. in metho. histor. cap. 6.

<sup>b</sup> l. nihil interest. l. postliminium. §. transfuga. D. de captiu. l. amissione. §. qui deficiunt. D. de capti. minit.

<sup>c</sup> Philipp. 8. d 5. de bello iusto cap. 2.

<sup>e</sup> l. si captiuus. §. c. pulsis. D. de capt. f l. in agris. D. de acq. rer. domin. l. item si verberatū. §. Item si. D. de rer. vend.

<sup>g</sup> Dion. Halic. ant. Rom. lib. 2.

DE IVRE ET OFF. BELL.

*a Aelius*  
*L. Apr. in vita*  
*Alex. Sever.*

*b Reg. l. 19.*  
*tit. 26. par. 2*

*c lib. 7.*

*d cap. dicat.*  
*23. quest. 5.*

*e l. si quis pro*  
*ved. pro me. C.*  
*de donatio.*

attentius illos militaturos existimans, si  
 sua iura defenderent<sup>a</sup>. Sed cum hi agri  
 non militibus, sed principi acquirantur,  
 solius principis arbitrio, quid de iis fieri  
 placet, relinquetur. ex constitutionibus  
 quoque regni Hispaniæ, non solum a-  
 gri, sed etiam naues bellicæ, bello fortè  
 nauali captæ, regi acquiruntur<sup>b</sup>. Quod  
 verò ad reliquam prædam rerum mobi-  
 lium attinet, nec ea quidem militibus  
 acquiri solebat, & ne dux quidem vllum  
 ius in eam habebat: sed quæstoris erat  
 eam vendere, & pecuniam in ærarium  
 referre. quod lege cautum fuisse tradit  
 Dion. Halic.<sup>c</sup> & hac potissimum de cau-  
 sa Marcium Coriolanum, quòd præda  
 ex Volscis militi diuisa, hanc legem vio-  
 lassèt, a populo condemnatum fuisse.  
 eoq; spectat, quod D. Ambrosius dicit,  
 disciplinam militarè docere, vt regi ser-  
 uentur omnia, ex èplo Abrahæ, qui ces-  
 sit omnem prædam regi Sodomorum<sup>d</sup>.  
 Postea tamen apud Romanos, prædam  
 omnem arbitrio ducis \* fuisse, certū est<sup>e</sup>. 4  
 idque ex aliquot Liuij locis apertè satis  
 liquet. Itaque refert, cùm Phocenses,  
 portis apertis, pacti ne quid hostiliter  
 paterentur, se Romanis dedidissent; &  
 nihilo-

nihilominus milites ad diripiendam urbem discurrerent, L. Æmilium restitisse, & reuocasse milites, dicendo, captas, nō deditas vrbes diripi: & in his tamen arbitrium esse imperatoris, nō militum<sup>a</sup>. <sup>a</sup> *Liuius l. 37*

& alibi idem Liuius dicit, Camillū Veios obsidētem, cū iam in manibus videret victoriam, urbem opulentissimam capi, tantumque prædæ fore, quantum nō omnibus in vnum collatis ante bellis fuisset: ne quam inde aut militum iram, ex malignitate prædæ partitæ: aut inuidiam apud patres, ex prodiga largitione caperet: quid de præda fieri placeret, ad senatum reiecisse<sup>b</sup>. Solent autem <sup>b</sup> *Liuius l. 5,*

5 imperatores\* nonnunquam prædam totam, vel partem eius in ærariū per quæstores referre<sup>c</sup>. Itaq; L. Furrius prætor <sup>c</sup> *Cicer. epist. 27.*

de Gallis triumphans, trecenta viginti millia æris in ærariū tulit: argenti clxx. millia pondo<sup>d</sup>. Ingentem quoque vim <sup>d</sup> *Liuius l. 31*

auri & argenti M. Heluius & Q. Minucius ex præda Hispaniēsi in ærarium tulerunt: & T. Quintius Philippo deuicto<sup>e</sup>: & longè maximā L. Æmilius Paulus, deuicto Perseo<sup>f</sup>. & Camillo duce, <sup>e</sup> *Liuius l. 34*

fufis Faliscis, castris eorum captis, præda <sup>f</sup> *Liuius l. 45*

omnis ad quæstores redacta est, cum magna mi-

DE IVRE ET OFF. BELL.

gna militum ira : sed seueritate imperij  
victi, eadem virtutem & oderant, & mi-  
rabantur, vt inquit Liuius a. apud quem  
passim inuenias plurimū auri & argenti  
ex præda hostium in ærarium relatum  
fuisse. Nonnunquam imperatores\* ven-  
dere prædam, & militibus diuidere so-  
lent, donatis ante alios iis, quorū virtus  
in bello maximè eniteret: habita quoq;  
ratione dignitatis cuiusque, & ordinis.  
Sic Iulius Cæsar in Gallia militibus, pro  
labore & tolerãtia (qui brumalibus die-  
bus, itineribus difficillimis, frigoribus  
intolerandis, studiosissimè permanserãt  
in labore) ducenos sestertios: centurio-  
nibus duo millia nummūm, prædæ no-  
mine condonanda pollicitus est b. & ex  
præda, quam L. Æmilius Paulus Perseo  
victo fecerat, pediti in singulos centeni  
dati: duplex centurioni; triplex equiti c.  
M. Valerius Coruinus Samnitibus præ-  
lio victis, & C. Iunius Bouiano capto,  
prædam omnem militi dederunt d. & se-  
natus prædam Epiri ciuitatum, quæ ad  
Persea defecerant, exercitui dedit. Itaq;  
signo ad diripiendas vrbes dato, tanta  
præda fuit, inquit Liuius e, vt in equitè  
cccc. denarij, peditibus duceni diuide-  
rentur.

a lib. 6.

b A Hyr. de  
bet. Gall. l. 8.

c Liuius l. 45

d Liuius l. 7.  
c. 9.

e lib. 45.

rentur. & hæc prædæ diuisio, etiam iure probata viderur<sup>a</sup>. Ex sacris quoq; literis constat, Dominum præcepisse Moyfi, vt ipse & Eleazar tollerēt vniuersam prædā, factam ex Madianitis, quos Israëlitàe deuicerant, & ex æquo eam diuiderent inter eos, qui pugnauerant: & vt quinquagesima pars daretur Leuitis, qui excubabāt in tabernaculis Domini<sup>b</sup>. & Dauid, Amalæchitis prælio victis, collegit omnem prædam; cumq; illi, qui in prælio fuerant, peterent sibi tantum diuidi, nec quicquam dari iis, qui cum illis non fuerant: dixit Dauid<sup>\*</sup>, æquam partem habituros, qui descendissent in prælium, & qui remansissent ad sarcinas. quod deinceps pro lege seruatum fuit in Israël<sup>c</sup>. idq; etiam constitutionibus regni Hispaniæ decisum est<sup>d</sup>. Quò spectat, quòd C. Fabius Ambustus tribunus militum, cum ad Auxur oppugnandum accessisset, collegis suis, Cn. Cornelio Cossò, & Valerio Potito, cum parte exercitus ad deuastrandos fines, vt distinerent Volscos, profectis, capta vrbe a præda militem continuit, donec collegæ cum suis exercitibus venirent: ab illis quoque captum Auxur dicti-

<sup>a</sup> c. ius militare. d. 57. l. 1. si quis pro redemptio. C. de donatio. Barto. in l. si quid bello. D. de captiui. Hisp. reg. lib. 1. 17. 19. & 20. tit. 26. par. 2. b Num. 31.

<sup>c</sup> Reg. 1. c. 39

<sup>d</sup> Reg. 1. 25. tit. 26. par. 20

DE IVRE ET OFF. BELL.

a *Linus l. 4.*
 dictitans esse, qui ceteros Volscos a præ-  
 sidio eius loci auertissent<sup>a</sup>. Solent deni-  
 que imperatores<sup>\*</sup> ad excitandos militū 8  
 animos, nonnunquam totam prædam  
 militibus ante cōflictum edicere, & pati  
 habere quod cuique fors belli dedisset.  
 vti de præda Veiorum decreuit senatus,  
 ex sententiâ P. Licinij, gratius id fore di-  
 centis, lætiusque, quod quisque sua ma-  
 nu ex hoste captum, domum retulisset,  
 quàm si multiplex, alterius arbitrio ac-  
 ciperet: quamuis refragante App. Clau-  
 dio, qui largitionem nouam, prodigam,  
b *Linus l. 5.*
 inæqualem, inconsultam arguebat<sup>b</sup>. &  
 hæc quidem quoad illa, quæ in conflictu  
 & prælio acquiruntur. alioqui verò res  
 hostiles, quæ citra certamen ad quem-  
 cunque perueniunt, sunt eius qui prius  
 possessionem nactus est<sup>c</sup>. Ceterum etiã  
 præda militibus concessa, principi<sup>\*</sup> ni-  
9
 hilominus sua portio debetur<sup>d</sup>: quæ ex  
 constitutionibus regni Hispa. est quin-  
 ta pars prædæ<sup>e</sup>: quandoq; tertia<sup>f</sup>: quan-  
 doque dimidia 8. duci quoq; exercitus,  
 ex iisdem constitutionibus, debetur se-  
 ptima pars prædæ, quandoque decima<sup>h</sup>.  
 Sed & si fortè bello nauali, rex suppedi-  
 tet naues cum armamentis, & præbeat  
 anno-

c *L. transfu-  
 gâ. D. de acq.  
 rer. dom. l. 1.  
 in priu. D. de  
 acqui. poss.  
 d c. ois mili-  
 tare. dist. 1.  
 e R. g. lib. 4.  
 tit. 26. par. 2.  
 f Reg. l. 20.  
 d. tit.  
 g l. 19. tit. 26  
 p. 2.  
 h Reg. l. 14.  
 dist. tit.*

annonam, & stipendia militibus ac nau-  
tis: ex iisdem constitutionibus, præda  
omnis, non ducis vel præfecti, sed regis,  
cui acquiritur, arbitrio est. nec quicquã  
**militēs** vel nauæ ex ea accipient, nisi  
quid ex liberalitate sua rex illis conces-  
ferit<sup>a</sup>. alias verò regi sua portione præ-<sup>a Reg. 29. d.</sup>  
stita, reliquum præfectus maris inter mi-<sup>lit.</sup>  
lites, ac nauas diuidere potest, ex quo  
septima pars præfecto maris debetur<sup>b</sup>. <sup>b Reg. l. 30.</sup>  
**10** Solent \* præterea Romani, vt victoria <sup>dist. 11.</sup>  
potirentur, partem prædæ diis suis vo-  
uere. itaque Camillus, cùm ad delédam  
urbem Veios pergeret, decimam partẽ  
prædæ Pythico Apollini vouit<sup>c</sup>. Neque <sup>c Liviu. l. 5.</sup>  
**11** omittendum est disciplina militari \* se-  
uerissimè fuisse cautum, vt non nisi de-  
uictis hostibus, castris eorũ captis, arce  
vel oppido omnino in potestatem re-  
ductis, ad prædam discurrere liceret: &  
ne tum quidẽ, nisi ab imperatore signo  
dato, vt maximè ante conflictum prædã  
omnem militibus edixisset: ne scilicet a-  
uiditate prædæ, vt plerunque solet, ho-  
stis è manibus elabatur, aut prælium re-  
stauret: vt Samnitibus accidit: qui cùm  
in noctem æquo Marte cum Romanis  
pugnassent, tãdem auiditate prædæ, im-  
petum

DE IVRE ET OFF. BELL.

petum in impedimenta Romanorum (quæ procul ab armatis sine præsidio, sine munimento stabant) facientes, a Marco Fabio magistro equitum, iussu Cornelij Arinnæ dictatoris dissipati, impeditique miserè cæsi sunt, & victoriam Romanis tradiderunt<sup>a</sup>. præterea ita ferme euenit, ut App. Claudius dicebat, ut segnior sit prædator, ut quisque laboris periculi que præcipuam petere partem solet. Itaque Veis captis, quorum prædam senatus militi concesserat, non tamen nisi permissu Camilli dictatoris, ad prædam discurrere licuit<sup>b</sup>. sicut nec ad prædam Epiri ciuitatum, quæ ad Persea defecerant, a senatu exercitui datam, nisi signo ad diripiendas vrbes dato<sup>c</sup>. Carthagine quoque noua expugnata, arce demum dedita, signo dato, victores ad prædam versi sunt<sup>d</sup>. Atque ita rectè constitutionibus regni Hispaniæ sancitum est, ut si quis nondum deuictis hostibus prædæ incumbat, partem prædæ amittat, & duplum eius quod prædatus fuerit, præstet, & in deteriorem militiam detur. Et quidem si prædantium culpa, hostes præ-

lium

<sup>a</sup> *Liuius* l. 8.

<sup>b</sup> *Liuius* l. 5.

<sup>c</sup> *Liuius* l. 45.

<sup>d</sup> *Liuius* l. 26.

illum restituerint, & vicerint, aut regem occiderint, non secùs quàm si ipsi id admisissent, puniuntur<sup>a</sup>. Ille quoque qui in diuisione prædæ \* fraudem committit, pœna dupli, & amissione partis prædæ, iisdem constitutionibus plectitur<sup>b</sup>. Qui verò prædam ab hostibus captam surripuit, lege peculatus teneri, & in quadruplum damnari Modestinus respondit<sup>c</sup>. Sed nec illis \*, qui in acie fugerint, aut ignaui & secordes fuerint, debetur pars prædæ. *Bald. in l. si quis pro redempt. C. de donat. l. omne delictum. §. qui prior. D. de re milit. reg. Hisp. li. 1. & 20. tit. 26. par. 2.* Itaque L. Quintius Cincinnatus dictator, cùm Lucium Minucium Consularem, & eius exercitum ab obsidione Æquorum liberasset, castris hostium captis, plenis omnium rerum, prædam omnem suo tantum militi dedit, consularem exercitum, ipsumque consularem increpans: Carebis, inquit, parte prædæ miles, ex eo hoste, cui prope prædæ fuisti: & tu L. Minuci, donec consularem animum habere incipias, legatus his legionibus præeris<sup>d</sup>. Sed & cùm nihil magis exercitum grauet \*, neque

<sup>a</sup> Reg. l. 2. 3.  
 C. 19. tit. 20  
 par. 2.

<sup>b</sup> Reg. lib. 3.  
 tit. 28. par. 2

<sup>c</sup> in l. fan.  
 D. Ad l. ludi  
 pecul.

<sup>d</sup> Linius l. 3.

DE IVRE ET OFF. BELL.

neque corrumpat, quàm impedimen-  
torum multitudo, disciplinæ militari  
maximè conveniens erit, iubere milites  
prædam omnem vendere, exemplo P.  
Decij: qui expugnatis aliquot oppidis  
in Samnio, prædam omnem milites quàm  
primùm vendere coëgit, ne impedimē-  
tis grauibus oneraret agmen<sup>a</sup>. Sciendum  
verò est res sacras<sup>\*</sup> prædæ non cedere. **15**  
cùm enim nullius sint, hostiles, quæ solè  
in præda sunt, dici non possunt. quod e-  
nim diuini iuris est, vt inquit imperator,  
nullius in bonis est<sup>b</sup>, & hominum po-  
testati non sunt subiecta. qui itaque hu-  
iusmodi quid rapuerit, sacrilegij poena,  
ex lege Iulia, pro qualitate personæ. &  
rei conditione punietur<sup>c</sup>. Itaque Sci-  
pio, diruta Carthagine, & præda militi  
concessa, cùm multis præmiis & donis  
afficeret milites; eorum qui fanum A-  
pollinis spoliarent & violarent, rationem  
non habuit<sup>d</sup>. Sed an sacrilegium com-  
mittat, qui rem priuatam in ædem sacrâ  
depositam surripuit, olim cõtrouersum  
fuit<sup>e</sup>. Sed Antoninus & Seuerus actio-  
nem furti, non sacrilegij dari rescripse-  
runt<sup>f</sup>. ideoque hanc rem prædæ cedere  
dicendum est. Cicero tamen in suis le-  
gibus,

<sup>a</sup> *Lincol. l. 11*

<sup>b</sup> *§. nullius.  
inst. de rer.  
diuis. l. 1. d.  
de rer. diuisio.*

<sup>c</sup> *l. sacrilegij.  
D. ad l. l. d.  
pecul.*

<sup>d</sup> *Appian. in  
bell. pun.*

<sup>e</sup> *Quint. Inst.  
orat. l. 7. c. 4.  
Cicer. de in-  
uerm. lib. 2.*

<sup>f</sup> *l. Diui. D.  
ad l. l. d. pec.*

gibus<sup>a</sup>, inter rem sacram, & sacro com-  
 mendaram non distinguit. quod & ca-  
 nones nostri sequuntur<sup>b</sup>. Quod vt verū  
 sit inter ciues, hoc tamen nostro casu nō  
 puto procedere: quia res sacro commē-  
 data, certè sacra dici non potest, quæ in  
 nullius bonis est<sup>c</sup>. cū itaq; sit res pri-  
 uati, & in alicuius bonis sit, & hostilis,  
 eam prædæ cedere existimo. vt enim res  
 prædæ sit, sufficit eam hostilem esse<sup>d</sup>.  
 Porrò quod dicimus iusto bello capta  
 fieri capientium: nō solū in rebus, sed  
 etiam personis liberis, iure gentium &  
 ciuili receptum fuit: vt mancipia fierent  
 capientium, & ex personis res, quæ sunt  
 in dominio<sup>e</sup>. vnde seruitus orta<sup>f</sup>. Inter  
 16 Philosophos verò quæri solet<sup>\*</sup>, natura  
 ne an instituto hominum, hæc persona-  
 rum diuisio, in liberos & seruos primū  
 in mores perducta sit: & Aristoteles na-  
 turalem ait g: Iureconfulti verò, contra  
 naturam seruitutem inductam, iure gé-  
 tium esse affirmant<sup>h</sup>: iure enim naturali,  
 omnes homines ab initio liberos nasci,  
 & natura omnes æquales esse<sup>i</sup>. quod e-  
 tiam Cicer. probat<sup>k</sup>. Nihil enim vinum  
 vni tam simile, inquit, tam par, quam in-  
 ter nosmetipsum sumus. Id tamen seru-

<sup>a</sup> lib. 2. de le-  
gib. 1.

<sup>b</sup> in c. quis-  
quid. 17. q. 4.

<sup>c</sup> d. §. nullius

<sup>d</sup> l. naturalē.  
in fine. d. de  
fugam. D. de  
acq. rer. dom.

<sup>e</sup> l. hostes. Et  
toto tit. D. de  
captiu.

<sup>f</sup> l. ex hoc iur.  
re. D. de iust.

<sup>g</sup> Et iur. §. ius  
autem gentium  
iussit. de iure  
natur. cap. ius  
gentium. dist. 1.  
c. 1. dist. 7.

<sup>h</sup> in Polst. ub.  
1. c. 1.

<sup>i</sup> §. seruitus.  
iussit. de iur.  
person. §. ius  
autem gentium  
iussit. de iur.  
natur.

<sup>k</sup> l. quod atti-  
net. D. de reg.  
iur.

<sup>\*</sup> de leg. lib. 1

DE IVRE ET OFF. BELL.

a §. sed naturalia. inst. de iure natur.

b in libris de repub.

c l. manumissiones. D. de iur. et iur. d. l. quod continet. D. de reg. iur. e l. hom. 1. 2. q. 1. 94. art. 5. Præp. in c. ius gentium. dist. 1. fl. 3. l. naturalem. l. adeo. D. de acq. re. dom.

g §. ius autem gentium. inst. de iur. natur. l. ex hoc iure. D. de iust. et iur.

pulo non caret, cum iura naturalia sint immutabilia, & iure gentium tolli non possint a, iniustum quoque videtur, & a natura abhorrere, ut homines hominibus feruiant, quamuis id fieri reipub. fortasse expediat. quo potissimum argumento, veteres quidam olim defendere conati sunt, id quod vulgò ferebatur, rempublicam sine iniusticia stare, augeri que non posse: quorum disputationem suscipientem Philum inducit Cicer. b cui tamen optimè ibidem satisfecit Lælius, ut in præfatione huius operis diximus: vbi ostendimus, non esse iniustum, ut bello victi fiant serui, quibus adde, ut nondum hūc dissoluamus, quod libertas sit quidem iuris naturalis, eò scilicet quod ante constitutionem iuris gētium, omnes liberi nascebantur c, & omnes homines pares, & æquales habebantur d: non autem, quod ius naturale ea de re aliquid præceperit, aut seruitutem prohibuerit e. Ius verò gentium, quod naturali ratione constitutum est f, bella & seruitutes induxit g. Recta enim ratio naturalis, qua nihil diuinius est, qua que præstamus belluis, hominum crescente malitia, coërcendam humanam improbitatem

bitatem bello, captiuitate, & seruitute  
 suasit<sup>a</sup>. Similiter cùm iure naturali, pri-  
 mo illo, & aureo, vt ethnici vocabant, a c. Sexto die.  
 25. distinct.  
 sæculo, communia essent omnia, neque  
 cuiusquam quicquam proprium: poste-  
 rioribus tamẽ sæculis, quòd communio  
 rerum viciatæ naturæ non conueniret,  
 ius gentium ex naturali ratione, domi-  
 nia, eorũque distinctiones constituit<sup>b</sup>. b l. ex hoc iu-  
 re. D. de iust.  
 & iur.  
 Rerum itaque omnium communio, æ-  
 qualitas hominum, & omnium vnà li-  
 bertas, integrę olim naturę, & primę rei-  
 pub. Platonis magis, quàm ferreo sæcu-  
 lo conuenit: ideoque iure gentium non  
 probantur. Quamuis itaq; seruitus iure  
 naturali, quo iure omnes homines li-  
 beri erant, & pares, & æquales habeban-  
 tur<sup>c</sup>, fuerit incognita: potuit tamẽ iure c l. manumif-  
 siones. D. de  
 iust. & iur.  
 l. quod atti-  
 net. D. de reg.  
 iur.  
 gentium constitui seruitus, vtque capti  
 iusto bello fierent serui: præsertim cum  
 id reipub. conueniat, ad coercēdoseos,  
 qui iniusta bella gerūt. vndẽ eadem ra-  
 tio, quæ bella permittit, etiam seruitutẽ  
 constitui suasit. suntque in hanc senten-  
 tiam præclara D. Augustini verba<sup>d</sup>, cùm d de ciuit. Dei  
 lib. 19. c. 15.  
 ait: *Conditio seruitutis iure intelligitur*  
 » *imposita peccatori. nomen itaque istud*  
 » *culpa meruit, non natura. & deinde sub-*

DE IVRE ET OFF. BELL.

dit : Nullus autem natura, in qua prius »  
 Deus hominem condidit, seruus est ho- »  
 minis, vel peccati: verum poenalis serui- »  
 tus ex lege ordinatur : quæ naturalē or- »  
 dinem conseruari iubet, perturbari ve- »  
 tat. quia si contra illam legem non esset »  
 factū, nihil esset poenali seruitute coer- »  
 cendum. Itaque Apostolus seruos mo- »  
 net subditos dominis suis esse debere, & »  
 ex animo seruire <sup>a</sup>. & propter peccatum, »  
 Chanaan seruus pronūciatus est a Noe »  
 patre, vt seruiret fratribus suis <sup>b</sup>. Suadet »  
 tamen idem Apostolus, vt Domini ali- »  
 quid de iure suo remittant: & in quibus- »  
 dam pares omnes esse dicit <sup>c</sup>. Sciendum »  
 autem est <sup>\*</sup>, hāc seruitutem personarum **17** »  
 tollere quidem libertatem; sed non illā »  
 naturalem, quæ in faciendo consistit. »  
 nā seruus, vt maximè dominus iubeat, »  
 potest nolle adire hereditatem <sup>d</sup>: sed il- »  
 lam, quæ ad iuris effectus est comparata, »  
 & iure gentium inuenta <sup>e</sup>. Sed nec vlla »  
 vis <sup>\*</sup>, quæ facti est, seruitutē inducit, quæ **18** »  
 iuris est. nam non nisi iusto bello capti, »  
 fiunt serui: nō etiam capti a latronibus, »  
 vel prædonibus, & iis, qui iusti hostes nō »  
 sunt <sup>f</sup>. Et quidē inter Christianos <sup>\*</sup> lau- **19** »  
 dabili, & antiqua consuetudine intro- »  
 ductum

<sup>a</sup> Ad Ephes. 6

ad Tim. 1. c. 6

ad Titum c. 2

ad Collos. c. 3

<sup>b</sup> Genes. c. 9.

<sup>c</sup> Ad Gal. 5.

ad Ephes. cap.

ult. ad Coloss.

cap. 4.

<sup>d</sup> l. cum pro-

posas. C. de

hered. inst. tit.

et l. manus

firmas. D. de

inst. & iur.

<sup>e</sup> l. ius autem

gentium. inst.

de iur. nat. l.

quidam. D. de

pen.

<sup>f</sup> l. postlimi-

rium. §. 4. pi-

rati. l. hostes.

D. de captus.

l. 1. in prin. D.

de leg. 3. l. qui

D. de testam.

a latronibus.

ductum est, vt capti hinc inde, vtcunque iusto bello, non fierent serui: sed liberi seruarentur, donec soluant precium redemptionis, quod Græci λύτρον vocāt<sup>a</sup>. Romulus vero, vt ciuitatem suam auget, & ex parua magnam faceret, bello captos necari, vel etiam venundari vetuit: sed in partem agri hostilis colonos Romanos misit, & multis populis deuitis ius ciuitatis dedit<sup>b</sup>. Si tamen qui Christiani militent Saracenis, & infidelibus contra Christianos, eisue auxiliū quoquo modo præbeant, capti a Christianis fient serui: inciduntque in excōmunicationem ipso iure<sup>c</sup>. nō enim iam Christianorum, sed infidelium, quibus se adiunxerunt, numero habendi sunt<sup>d</sup>: non tamen aliis, quàm Christianis vēdi poterunt<sup>e</sup>. at verò si bellum geratur cū infidelibus, & paganis: certè hinc inde capti, eius erunt conditionis, cuius secundum ius ciuile capti ab hostibus, idque cōstitutionibus regni Hispaniæ decifum videtur<sup>f</sup>. atque ita locus erit legis Corneliæ & postliminij fictionibus<sup>g</sup>. Quàm autem non conueniat, quamq; periculosum sit reipublicæ, numerum seruorum augeri, indicant tot bella ser-

<sup>a</sup> Boerius de-  
cis. 178. Bald.  
in l. hostes. D.  
de captiu. Al-  
ciat. in l. ho-  
stes. D. de ver.  
fig. reg. Hisp.  
l. i. tit. 29. p. 2  
<sup>b</sup> Dion. Hal.  
ant. Roma. l. 2  
<sup>c</sup> c. ita quorū-  
dam. c. ad li-  
berandum. de  
Iude. reg. Hisp.  
l. 4. tit. 21. p.  
4. Reg. lib. 9.  
tit. 29. par. 2  
<sup>d</sup> Text. et g  
in l. 3. §. ult.  
D. ad l. Corn.  
de Sica. l. pro-  
dutores. D. de  
ve mil. l. trāf-  
fugam. D. de  
acq. rer. don.  
o l. unica. Co-  
de Christi.  
<sup>e</sup> mand. d. reg.  
l. 9.  
<sup>f</sup> Reg. l. 2. tit.  
21. par. 4. reg.  
l. i. tit. 29. p. 2  
<sup>g</sup> Alciat. in l.  
hostes. D. de  
verb. signif.  
Claud. Cant.  
in §. Item ca.  
instit. de ver.  
diuis. Covar.  
in c. peccatis.  
de reg. iur. in  
6. 2. par. elec.  
§. 11.

DE IVRE ET OFF. BELL.

milía, coniurationesque seruorum, quæ  
 republ. Romanam aliquoties affixe-  
 runt, & in summum discrimen adduxe-  
 runt: vt latè ostendit Bodinus <sup>a</sup>. Porrò  
 liberæ personæ\* in bello captæ, & in ser- 20  
 uitudinem redactæ, si ad suos reuertantur,  
 quocunque modo potestatem hostium  
 euaserint, pristinā libertatem recipiūt <sup>b</sup>.  
 quemadmodum fera animalia, desinunt  
 eius esse, qui cepit, vbi eius custodiam e-  
 uaserint <sup>c</sup>. Recuperant præterea ab hosti-  
 bus reuersi omne ius, quod captiuitate  
 amiserant: iure scilicet postliminij <sup>d</sup>. nisi  
 tamē iurauerint \* se redituros ad hostes, 21  
 vel non abituros. quo casu, ad suos re-  
 uersi non possunt dici rediisse postlimi-  
 nio. vt in causā Attilij Reguli, & illorū,  
 quos post Cannensem cladem iuratos  
 ad senatum misit Annibal, in castra redi-  
 turos, nisi de captiuis redimendis impe-  
 trassent, responsum est <sup>e</sup>. non enim satis  
 est, corpore domum rediisse, nisi etiam  
 mēte, & animo sis reuersus. vnde & illi,  
 qui ea mente venit, vt ad hostes reuerta-  
 tur, non est postliminium <sup>f</sup>. Transfuga  
 quoque \* nullum habet postliminium. 22  
 nam, vt ait Paulus <sup>g</sup>, qui malo consilio, &  
 proditoris animo patriā relinquit, ho-  
 stium

<sup>a</sup> de repub. l.  
 1. cap. 5.

<sup>b</sup> l. nihil in-  
 terest. D. de  
 captiui.

<sup>c</sup> §. sero au-  
 tē. inst. de rer.  
 dou. s. i. u. u.  
 ralem. D. de  
 acq. rer. dom.  
 d. l. postlimi-  
 nium. in prin.  
 D. de captiui.

<sup>e</sup> in l. postli-  
 minij. §. vit.  
 D. de captiui.  
 v. g. Hisp. in  
 lib. 9. tit. 29.  
 par. 2. Cicero  
 offic. lib. 3.

<sup>f</sup> l. nihil in-  
 terest. D. de  
 captiui.

<sup>g</sup> in l. postli-  
 minium. §.  
 transiege. D.  
 de captiui.

stium numero est habendus: siue foemina, siue masculus sit, siue filiusfamilias, siue paterfamilias. Neque enim pater filiumfamilias trās fugam postliminio recipit. quia pater sic illum amisit, vt idem Paulus ait, quemadmodū patria, & quia disciplina castrorum antiquior fuit parentibus Romanis, quā charitas liberorum<sup>a</sup>. Aliud tamen est in seruo transfuga, in quo Dominus habet postliminium: ne scilicet contrarium ius nō tam sit seruo iniuriosum, quā domino dānosum<sup>b</sup>. Sciendum est autem omnibus hominibus esse postliminium, cuiuscūque sexus, ætatis, vel conditionis sint<sup>c</sup>. Militibus verò vt sit postliminium, docere debent se bello captos fuisse<sup>d</sup>. nam illi<sup>e</sup> qui armis victi se hostibus dedunt, carent postliminio<sup>e</sup>. Etenim apud Romanos ignominiosissimum habitū fuit, non vi, sed per deditiōem in potestātē hostium venire. Itaque senatus octo illa millia Romanorum, qui non quidem in acie capti fuerant, sed in castris relictī, post cladem Cannēsem se Annibali dederant, potestate sibi facta, redimere noluit: vt scilicet insitum esset Romanis militibus, aut vincere, aut emori<sup>f</sup>. qua

<sup>a</sup> d. l. postliminii. §. si. l. i.

<sup>b</sup> d. l. transfuga.

<sup>c</sup> d. l. postliminium. in si.

<sup>d</sup> l. nō oēs. §. a barbaris.

<sup>e</sup> d. de re mili.

<sup>e</sup> l. postliminio. D. de captiu. reg. l. i. §. p.

<sup>e</sup> l. i. §. ut. 29.

DE IVRE ET OFF. BELL.

a j. li. 3. c. 15 de re alio loco latius dicendum erit<sup>a</sup>. Sed  
 militi bello capto, & postliminio reuer-  
 so, non deberi stipēdia, & donatiua eius  
 réporis; quo apud hostes fuit, Antonin<sup>9</sup>  
 Imp. rescripsit<sup>b</sup>. si tamen expleto militie  
 tempore, captus ab hostibus redeat, vt  
 veteranum restituendum, & emerita re-  
 cipere, Arrius Mænander respōdit<sup>c</sup>. Sed  
 an ij, qui decreto senatus, vel iussu po-  
 puli per feciales hostibus dediti essent,  
 ad suos reuersi pristinum statum recipere-  
 rent, inter Brutum & Scæuolam variè  
 tractatum est. eoque spectat nobilis illa  
 causa Mancini<sup>\*</sup>, de quo cum ob pacem 24  
 minus legitimè cum Numantinis factā,  
 ex S. C. hostibus deditus esset: eumque  
 illi non accepissent: an ciuis Romanus  
 maneret, quæsitum est: quibusdam exi-  
 stimantibus non manere. quare P. Ruti-  
 lius, M. filius. trib. pleb. eum de senatu,  
 in quem domum reuersus introire non  
 dubitarat, iussit educi: quòd eum ciuem  
 esse negaret. quia memoria sic esset pro-  
 ditum, quē pater suus, aut populus ven-  
 didisset, aut pater patratus dedidisset, ei  
 nullum esse postliminiū<sup>d</sup>. Neq; referre  
 videtur, quòd hostes eū non receperint.  
 nā ciuis esse definit, quem ciuitas repu-  
 diauit,

b in l. r. C. de  
re milit. l. 12.

c in l. 3. §. si  
quis ad hostes.  
in l. 40 omnes.  
§ pen. D. de  
re milita.

d Cicero. de o-  
rat. lib. i.

diavit, licet ab hostibus nō sit acceptus<sup>a</sup>, nō secus quā is, cui aqua & igni interdīctū est, vel hostis declaratus, vel in insulā deportatus est<sup>b</sup>. cui sentētiā Modestinus accedere videtur<sup>c</sup>, qui respondit, hostibus deditū, & reuersum, nisi esset a suis receptus, ciuē non esse. sed Mācinus, licet non fuerit acceptus ab hostibus, eū ciuem mānisse aliis visum fuit. quod etiā Ciceroni probatur<sup>d</sup>: deditū enim dici nō posse, qui non sit acceptus. nam neq; donationē, neq; deditiōnem sine acceptiōne intelligi<sup>e</sup>. Pōpōnius tamē de Mācino legem postea latam fuisse, vt esset ciuis Romanus, scribit<sup>f</sup>. vnde videtur adhuc locus esse responso Modestini, etiam in eo, quem hostes non acceperūt, vt scilicet reuersus, non aliter sit ciuis, quā si a suis receptus sit. nam alioqui quid erat opus legem ferre de Mācino?

25 Porro in bello nō solū viri\*, sed etiam mulieres capi possunt. sic legimus vxorem Darij, cum matre, totaque familia, captam ab Alexandro: Sophonisbam vxorem Syphacis, a Masanissa: Cleopatram ab Augusto. maximam tamen clementiā famā sibi conciliauit Scipio per totam Hispaniam, quōd capta Cartha-

F 5 gine,

<sup>a</sup> Argumento  
l. i. §. si vir l.  
quod meo. §. si  
a furioso. D. de  
acqu. poss.

<sup>b</sup> l. amissione.  
§. i. D. de cap.  
inimic. inst. de  
cap. diminut.  
in prin.

<sup>c</sup> in l. 4. D. de  
captiu.

<sup>d</sup> in Topic. et  
pro A. Cecina  
in fin.

<sup>e</sup> l. absent. D.  
de donat. l. nec  
ambigi. C. de  
donat. facit l.  
si me in va-  
cuam, D. de  
acqu. possess.  
§. in l. ult. D.  
de legation.

<sup>g</sup> l. i. l. fedi-  
fime. l. praefet.  
cum l. sequ. l.  
commercio. C.  
de post. reuerf.  
l. non ut a pa-  
tre. l. mulier.  
D. de captiu.

DE IVRE ET OFF. BELL.

gine, Allucio Celtiberorum principi, sponsam suam eximia forma, quã captivam habebat, intactam gratis restituit<sup>a</sup>.

<sup>a</sup> *Linium l. 26*

<sup>b</sup> *l. lex Cornelia. D. de vulg. & pupill. l. pater. in prin. l. quod si filius. D. de captiv.*

Sed nec pueri in bello tuti sunt, & capi possunt<sup>b</sup>. licet Camillus, laudabili exē-

plo, nobilissimos Faliscorum pueros, quos ludimagister ipsorū in castra Camilli per astū perduxerat, non accepit:

sed proditorem nudum, manibus post tergum religatis, cædendū, ac reducendum Faliscis pueris tradidit, inquiring:

Nobis, quæ pacto fit humano, cum Fa-

liscis societas non est: quam ingeneravit

natura, est, eritque. sunt & belli, sicut &

pacis iura: arma habemus, non aduersus

eam ætatem, cui etiã captis vrbibus, par-

citur: sed aduersus armatos. qua benefi-

centia prouocati Falisci se spõte Roma-

<sup>c</sup> *Linium l. 5.* nis dediderunt<sup>c</sup>. Certè sæuire in foeminas, vel pueros, admodum foedū semper habitum fuit: quos sexus ipse, & ætas, periculis bellorum, & sæuitiæ victorum eximit. itaq; lege diuina præcipitur quidem Israëlitis, vt hostes resistentes, & pacem nolentes omnes occidant: sed vt parcāt mulieribus, & paruulis: quos tamen prædæ cedere voluit, & in seruitutē redigi<sup>d</sup>. Canones verò iubēt parci pre-

<sup>d</sup> *Deus. c. 20.*

bitæris,

- biteris, monachis, cōuersis, peregrinis, mercatoribus, & rusticis<sup>a</sup>. sed hoc contrario vsu abrogatum esse dicit Panormitanus<sup>b</sup>. non tamen credo abrogatū, quoad ecclesiasticos: in quos manuū iniectio est interdicta, sub graui anathematis pœna<sup>c</sup>. nisi fortè se ingerāt rebus bellicis. quia priuilegium amittit, qui eo abutitur<sup>d</sup>. Est quoque notatu dignum, quòd inter duos populos bello exorto, qui ex hostibus apud vtrumque populū fuerint, capi possint: licet in pace venerint: nam & olim serui efficiebantur<sup>e</sup>.
- 26 Iusto autem bello captus<sup>\*</sup>, qui pro sua redemptione moderatū precium promisit, non eximitur ab obligatione, ex eo fortè, quòd vi, metuue dicat se id precium promississe. nam edictū prætoris, quo per metum gesta rescinduntur, ad eum metum, qui iure licito alicui inferitur, non pertinet<sup>f</sup>. Præterea hīc nō tam metus inferitur, vt preciū promittatur, quàm timor mortis iustè imminētis ista promissione aufertur: præsertim cūm precium redemptionis, in locum seruitutis successerit<sup>g</sup>. Quod autē ad acquisitionem captiuorum attinet<sup>\*</sup>, idē quod de reliqua præda rerum mobilium, quæ est du-

a c. 2. de treu. & pa.

b in d. c. 2.

c cap. si quis suadente diabolo. 17. q. 4.

d c. ubi. 74. dist. cap. quia frustra. de resur.

e l. in bello. §. 1. D. de captiui.

f Text. elegans in l. si mulier. in princ. D. quod metus caus.

Panormit. in c. Abbas. col. 3.

in c. cū dilectis. de his qua vi. Felinus in c. cū miter. nu. 20.

de except. Domin. in c. ad eius verò. col. ult. dist. 5.

Syluester. in ver. metus. q. 6.

g Fort. in l. couentionum. D. de pac. fact. l. Nam & Seruus. D. de neg. gest.

DE IVRE ET OFF. BELL.

est ducis arbitrio, dicendum est: & ita olim obtinuisse testatur Dionys. Halic.<sup>a</sup> hodie verò plerunque captiui, vt & cetera mobilia, conceduntur capientibus; nisi fortè precium excedat summã decem millium coronatorum; vtputa si captus sit Dux, Comes, Baro, vel alius magni nominis: quo casu ex antiqua consuetudine Hispaniæ, Galliæ & Angliæ, est principis<sup>b</sup>. non tamen illi redimédi facultas adimitur, quæ etiam duci hostium capto cõcedi debet, si in eo pacis perturbatio non timetur<sup>c</sup>. nam, vt inquit D. Augustinus<sup>d</sup>, sicut bellanti, & resistenti violentia redditur, ita victoriis capto misericordia iã debetur. quare bene maiores nostri hoc comparaerunt, inquit Cicero<sup>e</sup>, vt neminem regem, quẽ armis cepissent, vita priuarent. quia quam nobis facultatẽ fortuna dedisset, iniquum erat in eorum supplicio consumere, quos eadem fortuna paulo ante in amplissimo statu collocarat. ei verò, a quo periculum restaurãdi belli esse posset, non est parcendum: quẽ esset iniusta misericordia, vt inquit D. Ambrosius<sup>f</sup>. Quò spectat, quòd Ferrandus Diaconus, de officio pij & Christiani ducis, ad Rhegi-

<sup>a</sup> Antiq. Rom. lib. 5.

<sup>b</sup> Bar. et Bal. in l. nam & Seruum. D. de neg. gest. 10ã. de Ana. in c. significanti. in 1. not. de iud. Boerius decis. 278. Hf. reg. l. 5. & 8. tit. 2. & par. 2. <sup>c</sup> c. noli. in fi. 23. q. 1. <sup>d</sup> in d. c. noli. <sup>e</sup> ad Heren. l. 4.

<sup>f</sup> offic. l. 1. c. 2. & in nota. 23. q. 2. l. 4.

Rheginum ducem scribens, inter septē regulas innocentiae, quas duci militum praescribit, refert: Noli esse nimiū iustus. Fuit itaque apud Romanos obseruatū, vt triumphās cū triūphali pōpa de foro in capitolium defleceret, captiuos insignes, qui semina discordiarum, & belli auctores fuissent, in custodiam detrudi iuberet, & exacta pompa neci daret <sup>a</sup>.

- 28 Alioqui verò priuata auctoritate\* nemi-  
ni captiuum occidere licet, nec etiam  
durius tractare: cū nec olim quidem  
licuerit, cū fierēt serui. ius enim ciuile  
dominico imperio modum adhibēs, ita  
demum necis potestātē domino tribuit  
in seruum, si in facinore deprehendat: in  
quo repertum liberum occidere ius sit <sup>b</sup>.  
alias seruum dominus occidere nō po-  
test, cui leuis tantū coërcitio permessa  
est <sup>c</sup>: & ex rescripto Diui Pij, seruis cōtra  
nimiam seuitiam, & intolerabilem iniu-  
riam dominorum prouisum est <sup>d</sup>, cui  
conuenit constitutio regni Hispaniae,  
quoad bello captos inter Christianos  
hinc inde: non etiam inter eos, qui di-  
uersae religionis dogmata sequuntur <sup>e</sup>.
- 29 Ceterum si captiuus\* semel de precio  
redemptionis conuenit cum eo, cuius  
capti-

<sup>a</sup> Alex. ab A-  
lex. gemal.  
dier. l. 6. c. 6.

<sup>b</sup> l. marito. D.  
ad leg. Iuliam.  
de adul. l. quid  
ergo si maio-  
rem. § si heres  
D. de leg. 1.  
c l. vnic. C.  
de emend. seru.  
d l. 2. D. de hic  
quis sui vel a.  
l. e. iur. sunt.

<sup>e</sup> Reg. l. 1. tit.  
29. par. 2.

DE IVRE ET OFF. BELL.

a Guido p<sup>o</sup>.  
 pa q. 113. Pa.  
 pon. in arrest.  
 lib. 5. tit. 6. in  
 prin.  
 b in l. postli-  
 minium. §. si  
 is qui. D. de  
 captiu.  
 c l. nā & Se-  
 rius. D. de  
 neg. gest.  
 d per text. c.  
 leg. in l. si id  
 quod. D. de  
 donat. inter  
 vir & uxor.  
 Covarr. in l.  
 4. decret. de  
 spō. 2. par. c.  
 3. §. 4. nu. 14.  
 e l. 2. l. liber  
 captus. C. de  
 postliminio  
 reuersis. l. se-  
 uatus. §. ult.  
 D. de leg. 1. l.  
 qui testamē-  
 to. §. 1. D. de  
 testam. l. qui  
 status. D. de  
 ra milit.  
 f l. quod &  
 lex. §. si quis.  
 D. de libe. ho-  
 mi. exhib.  
 iuncta l. liber  
 captus. C. de  
 postli. reuers.  
 §. d. l. 2. C. de  
 postli. reuers.  
 h l. is qui. C.  
 dist. 115.

captiuus est, non poterit postea ad du-  
 riorē conditionē astringi, ex eo fortē,  
 quōd is a quo detinetur, intellexit cap-  
 tiuum esse alicuius nominis, & diuitē:  
 neque valebit posterior conuentio, sed  
 fiet reductio ad priorem<sup>a</sup>. Quō spectat  
 quod Paulus respondit, si quis captū ab  
 hostibus emat, & pluris alij ius pigno-  
 ris, quod in redemptū habet, cesserit: nō  
 eam quantitatem, sed priorem redēptus  
 debet<sup>b</sup>. Qui autem pro capto<sup>\*</sup> ab hosti-  
 bus, vt liber fieret, precium redēptionis  
 vel soluit, vel promisit, nō solum habet  
 actionem negotiorum gestorum<sup>c</sup>: siue  
 iustus siue iniustus sit hostis, qui capti-  
 uum cepit<sup>d</sup>: sed habet quoque redem-  
 ptor ius pignoris in redemptum, donec  
 soluat<sup>e</sup>: & edicto de libero homine ex-  
 hibendo non astringitur, neque redem-  
 ptus pristinum statū recipit, donec pre-  
 cium redemptionis soluerit, vel obtule-  
 rit<sup>f</sup>. non erit tamē seruus, nec olim erat,  
 cū seruitus passim in vsu esset<sup>g</sup>: & fa-  
 uore ingenuitatis, poterit successionis  
 iura vindicare, vt ex successione possit  
 precium pro se datum soluere<sup>h</sup>: & filius  
 ei succedet, etiam si, antequam se luat,  
 moriatur. imo morte, quasi iure pigno-  
 ris si-

ris finito, ab ipso redemptore liberatur redemptus: ita vt neque heres eius teneatur ad precium redemptionis, neq; fideiussor <sup>a</sup>. Sed etsi ea quæ ex pignoribus nascuntur, pignoris vinculo obligari dicamus <sup>b</sup>: imperatores tamen noluerunt eos, qui post redemptionem nascuntur, pignoris vinculo obligari <sup>c</sup>. & hæc quidem in liberis ab hostibus captis, & commercio redemptis locum habent: at serui ab hostibus capti, & precio redempti, fiunt redimentis serui: sed oblato ei precio, quod dedit, postliminio rediisse, aut recepti esse creduntur <sup>d</sup>. Porro redemptio captiuorum <sup>e</sup> est tam fauorabilis, vt datum in hanc causam, quantumcunque sit, repeti non possit, nec in sinuatione opus habeat <sup>e</sup>. & quamuis incertæ personæ, ne miles quidem quicquam relinquere possit <sup>f</sup>: imperatores tamen pietatis causa, & militum infortuniis moti, relictum in redemptionem captiuorum, non obstante incertitudine personarum, valere voluerunt <sup>g</sup>: etiam si quis totum patrimonium relinquat <sup>h</sup>. Pietatis quoque causa redempto captiuo, vtpote si mater filium redemerit, de repetitione precij tractare non conuenit: sed

<sup>a</sup> l. si patre redempto. D. de captiu. l. 1. §. si filius. D. de suis & legit. <sup>b</sup> l. grege. D. de pignorib. <sup>c</sup> in l. presee prouincia. C. de post. venet.

<sup>d</sup> l. in bello. §. si quis seruum. D. de captiu.

<sup>e</sup> l. si quis pro redemptione. C. de donatio. <sup>f</sup> §. legari autem: in §. de leg.

<sup>g</sup> l. nulli. C. de epis. et cler. <sup>h</sup> l. si quis ad declinandum. C. de episc. & cleric.

DE IVRE ET OFF. BELL.

*a l. liber ca-  
ptus. §. 1. D.  
de postl. reuer.  
reg. Hsp. l.  
vic. tit. 29.  
par. 2.  
bl. fadisi re.  
C. de postl.  
reuerf.*

sed præsumitur donatio<sup>a</sup>. & redimens  
 puellam luxuriæ causa, vel illam prosti-  
 tuens, perdit precium, & puella impunè  
 ab eo fugere potest<sup>b</sup>. Negligens verò  
 redimere<sup>\*</sup> captiuum, non solum exhe-  
 redari potest, si sit ex liberis: sed etiam  
 lege, proximis agnatis, vel heredibus in-  
 stitutus, qui in redemptione captiui ne-  
 gligentes fuere, denegatur successio: quæ  
 applicatur ecclesiæ, expendenda in re-  
 demptionem captiuorum<sup>c</sup>. Diximus  
 captis ab hostibus, tam liberis, quam ser-  
 uis, & tam masculis, quam fæminis, esse  
 postliminium. videamus nunc reliqua,  
 quæ postliminio redeunt: quibus cogni-  
 tis, intelligemus, quæ sunt ea, quæ post-  
 liminio carent. contrariorum enim ne-  
 gantium, ut inquit Cicero<sup>d</sup>, ea vis est, at-  
 que natura, ut altero posito, vel cogni-  
 to, alterum statim submoueatur, vel co-  
 gnoscatur<sup>e</sup>. Postliminio itaque redeunt  
 quoque agri<sup>\*</sup>, eorumque ususfructus.  
 unde expulsis hostibus ex agris, quos  
 ceperat, dominia eorum ad priores do-  
 minos redire, & ususfructum iure post-  
 liminij restitui, Paulus respondit<sup>f</sup>.  
 quod verum puto, nullo quantumuis  
 longi temporis lapsu obstante<sup>g</sup>. Itaque  
 Sagun-

*c Authent. si  
captiui. C. de  
episc. & cler.  
reg. Hsp. l. 3.  
tit. 29. par. 2.  
d in Topic.  
e facti tex. in  
stit. de his qui  
sunt velati. i. i.  
sunt, in princ.  
f l. ult. §.  
ult. D. deleg.  
3. & ibi Bar.  
g in l. si cap-  
tius. §. ex-  
pulsis. D. de  
captiui. in l. si  
ager. D. quib.  
mod. ususfr. a-  
mitt. l. in tã-  
tã. no. prin. D.  
de rer. divisio.  
h c. prima a-  
ctiõne. cumi  
glos. ibid. q. 3  
i contra ma-  
iores. C. de in-  
off. seji am et.*

Saguntum oppidum, quod iam octauū annum in potestate hostium fuerat, tandem receptū, cultoribus antiquis, quos vis reliquerat belli, restitutum fuit<sup>a</sup>. & a Liius l. 24. quidem ex cōstitutionibus regni Hisp. imperia, regna, comitatus, aliaque dominia maiora, ab hostibus recuperata, postliminio redeūt, & ne ex eo quidem tempore, quo recuperata sunt, vsucapī possunt. quoad alia verò dominia minorā, si quatuor annis dominus siluerit, ex quo recepta sunt, erit locus præscriptioni, nisi dominus sit minor<sup>b</sup>. iisdēque cōstitutionibus cautum est, vt si quis ex subditis arcem, licet propriam, sua culpa amiserit: quamuis sua opera eandem receperit, regi tamen petenti eam tradere debet<sup>c</sup>. Denique<sup>\*</sup> nauibus longis, & o- c reg. Hisp. l. 32. tit. 23. par. 2. nerariis, postliminium esse Marcellus respōdit. qui equū quoque, & equā freni patientem, postliminio recipi voluit, quod sine culpa equitis proripere se poterūt<sup>d</sup>. & idem quoq; testatur Ciceroe, d L. 2. D. de captiu. e in Topic. cū ait: Postliminio redeunt hæc, homo, nauis, mulus, clitellarius, equus, equa quæ frena recipere solet. nō autem idē iuris est in armis, quæ postliminio nō redeunt, quod nō sine flagitio amittantur;

DE IVRE ET OFF. BELL.

a d. l. 2.  
 b j. lib. 3. c. de  
 iis qui arm.  
 amis.  
 c per l. si ca-  
 ptivus. §. ex-  
 pulsus. D. de  
 captivi.  
 d Argum l. si  
 quid b. llo D.  
 de capti. Ang.  
 Salic. las.  
 Mart. laud. &  
 alij, quos re-  
 fert Comar. in  
 c. peccatū de  
 reg. iur. in 6.  
 2. relect. §. 11  
 e Argu. l. ab  
 hostib. 2. C. de  
 postl. reu. s. l.  
 in bello. §. si  
 quis seruu D.  
 de capt. Frac.  
 Ripa. in l. 1.  
 D. de acq. pos.  
 Comar. disto  
 loco, & alij  
 ab eo citati  
 f Argu. l. ab  
 hostib. 2. C. de  
 postl. reu. s. l.  
 id quod apud  
 hostes. D. de  
 l. 1. et l. Popo.  
 D. de acq. rer.  
 do. Ioā. Andr.  
 Alex. Pyrrh<sup>o</sup>,  
 & alij quos  
 refert Comar.  
 in d. c. peccatū  
 g in l. si quid  
 bello. D. de  
 captiv.

tur<sup>a</sup>. de quo alio loco plura dicemus<sup>b</sup>.

Ex superioribus (ni fallor) manet ex-  
 pedita illa quæstio, quæ variè admodum  
 torsit fere omnes interpp. vtrùm scilicet  
 \*res semel ab hostibus captæ, & ab iisdē <sup>35</sup>  
 recuperatæ, prioribus dominis sint re-  
 stituendæ, nec ne quod alij aiunt, alij  
 negant, alij temerè secant, & subsecant,  
 & neque sibi, neque aliis satisfaciūt. sunt  
 enim qui distinguunt inter res mobiles  
 & immobiles, & has restitui semper<sup>e</sup>; il-  
 las nunquam existimant<sup>d</sup>. alij, quoad res  
 immobiles, distinguunt rursus, sintne  
 virtute bellica recuperatæ, quas non re-  
 stitui volunt: an verò commercio redē-  
 ptæ, quas oblato redemptionis precio,  
 restituendas priori domino censent<sup>c</sup>.  
 alij denique sine vlla distincōne, tam  
 mobiles omnes, quàm immobiles res,  
 receptas, priori Domino omnino resti-  
 tuendas esse dicunt<sup>f</sup>. idque contra eui-  
 dens responsum Labeonis<sup>g</sup>, qui ait: Si  
 quid bello captum est, in præda est, nec  
 postliminio redit. & alibi<sup>h</sup>; ita demū ab  
 hostibus captæ, & a nostris recuperata,  
 postliminio redire respondit, si sint eius  
 generis, quæ postliminio redire possunt.  
 quam

h in l. ult. D. de captiv.

quam distinctionē etiā Marcellus probat<sup>a</sup>. Neque vident id quod impp. rescripserunt<sup>b</sup>, seruos ab hostibus recuperatos, dominis suis restitui debere: ideo esse, quòd nō solùm in liberis personis, sed etiam in seruis sit postliminium<sup>c</sup>.

Quare etiam quod Octaenus respondit<sup>d</sup>, id quod apud hostes est, legari posse, & postliminiū esse: de eo haud dubiè intelligi debet, quod eius generis est, vt postliminio redire possit, secundum distinctionem Labeonis<sup>e</sup>. His adde, quòd

36 quamuis res, quæ sunt hostium<sup>f</sup>, nō sint in commercio<sup>f</sup>: tamen eas res, quas hostes ceperunt, si sint eius generis, quæ postliminium habent, vendi, legari, & quocunque modo alienari posse<sup>g</sup>. Quò spectat, quod apud Liuium legimus<sup>h</sup>: quòd cū Annibal ad quartū lapidem Romam accessisset, & tātū venditum esse agrum audisset, in quo castra habebat, quanti ante aduentum eius valebat: ira percitus, vocato præcone, tabernas argentarias, quæ in foro Romano erant, vendi iussit. & certè agri quidem veditio valuit, propter spē postliminij<sup>i</sup>: nō verò tabernarum, quæ nunquam fuerant hostium, nec erat in iis postliminium<sup>k</sup>.

<sup>a</sup> in l. 2. D. de captiui.

<sup>b</sup> in d. l. ab hostibus, 2.

<sup>c</sup> l. postl. §. ult. l. in bello. §. si quis seruum. l. ult. D. de captiu.

<sup>d</sup> in d. l. id quod apud hostes. D. de l. 1.

<sup>e</sup> in d. l. ult.

<sup>f</sup> l. liber homo. 1. D. de verb. oblig.

<sup>g</sup> l. itē Labeo. §. ult. cum l. §. q. D. famil. her. & d. l. id quod apud hostes. h. lib. 25.

<sup>i</sup> d. l. item Labeo.

<sup>k</sup> d. l. liber homo.

DE IVRE ET OFF. BELL.

Neque mouet, quod ex L. Pomponius D. de acq. rer. dom. adducitur, vbi cū pastori meo lupi porcos eriperēt, & hos vicinæ villæ colonus robustis canibus confecutus, lupis extorfisset: porcos coloni non esse, responsum est; sed meos manere, quamdiu a quouis recuperari possent: secus ac si feram bestiā vicinus hac ratione mihi abstulisset. quæ si potestatem nostram euaserit, & ab alio capiatur, ipsius fit. non inquam id mouet: nam ibi, disertis verbis I. C. ait, porcos, aliaque animalia mansueta, quæ a lupo nobis eripiuntur, nostra manere, quam diu recipi possunt, quæ erepta sunt: quemadmodum & ea, quæ naufrugia amittimus: vnde etiā furti agi posse dicit. aliud autē est in iis, quæ ab hostibus nobis auferuntur, quorum dominium statim in hostes transire cōstat<sup>b</sup>. vnde potius dicendum est, quòd, quemadmodū feræ bestiæ, vbi custodiam nostram euaserint, dominium amittimus, & eedem a quouis postea captæ occupantis fiunt<sup>c</sup>: sic quoque capta ab hostibus, quorum dominium statim amittimus, eius fieri, qui recepit, nec priori domino restituenda esse: nisi sint eius generis, quæ postliminio

<sup>a</sup> §. Auferū,  
inst. de rer.  
diuis.

<sup>b</sup> l. si quid bel  
lo, l. hostes, D.  
de captiu.

<sup>c</sup> d. l. Pompo-  
nius, & §. fe-  
re autem, inst.  
de rer. diuis.

minio redeunt<sup>a</sup>. ex quibus etiã corruit  
 eorum sententia, qui sine distinctione  
 omnes res mobiles, eorum fieri, qui eas  
 hostibus eripuerunt, existimant: & eorũ  
 quoque, qui inter res bellica virtute re-  
 ceptas, & commercio redemptas distin-  
 guendum putauerunt. Sit ergo ita con-  
 stitutum, vt quę res postliminiũ habent,  
 eę recuperatę ad priorem dominum, &  
 in pristinum statũ redeant, siue mobiles  
 sint, siue immobiles<sup>b</sup>: siue etiam virtute  
 bellica, siue commercio, siue quocunq;  
 alio modo recuperentur<sup>c</sup>. nisi quòd ea-  
 rum, quę commercio sunt redemptę,  
 precium restituatur<sup>d</sup>. quę verò postli-  
 minio carent, prædę cedunt<sup>e</sup>. Illud ra-  
 37 men sciẽdum est, prædam \*tum demum  
 fieri hostium, vt primũ intra præsidia  
 delata est<sup>f</sup>. vnde si recuperetur, antequã  
 intra præsidia hostiũ sit delata, omnino  
 priori domino restitui debet: quia non-  
 dum facta fuit hostium, neque desit esse  
 eius, cuius fuit<sup>g</sup>. Et quidẽ si ij, per quos  
 præda fuit recepta, fraudulẽter passi sint,  
 eam prius ab hostibus auferri, & intra  
 præsidia eorũ perferri, & eam persequi  
 neglexerint: non tantũ tenebũtur ad  
 restitutionem priori domino faciẽdam,

a l. vlt. D. de  
captiu.

b l. 2. C. 4. l.  
si captiuus. §  
expulsis. l. vlt.  
D. de captiu.  
l. ab hostib. 2.  
C. de postl. re-  
uers.

c per text. ele-  
gan. in l. 4. ea  
l. nihil inter-  
est. D. de ca-  
ptiu. §. si ab  
hostibus. iust.  
quib. mod. ius  
pri. po. solui.  
C. d. l. ab ho-  
stibus.

d l. ius bello. §  
si quis seruũ.  
D. de capt. l.  
liber captus.  
C. de postl. re-  
uers.

e l. si quid bel  
lo. l. vlt. D. de  
captiu.

f l. postlimi-  
nij. in princ. l.  
postliminiũ.

g. postlimin.  
D. de captiu.

g d. l. postli-  
minij. in princ.

DE IVRE ET OFF. BELL.

eius quod receperunt : sed etiam eius, quod seruare potuerunt, & eorum culpa amissum, domino præstandum erit, vt constitutionibus regni Hispaniæ optimè cautum est <sup>a</sup> : & facit text. in L. Iulianus <sup>b</sup>. Porrò huic distinctioni, sitne res ab hostibus capta, & per nostros recepta, eius generis, quæ postliminium habent : & sitne semel in præsidia hostium delata, nec ne, non subiacent res captæ a piratis\*, vel latronibus, & iis qui 38 iusti hostes non sunt. nam capta ab iis, nunquã in dominium eorum trãseunt. quare recepta, sine distinctione omnino priori domino, qui dominio eorum nunquam excidit, sunt restituenda <sup>d</sup>. hinc mirum, cur constitutio\* regni Hispaniæ 39 hanc distinctionem : fueritne præda recepta, semel intra præsidia hostiũ delata, nec ne, probauerit, in his rebus, non solum quæ ab hostibus, sed etiam quæ a piratis nobis ablata sunt <sup>e</sup> : cum certè, si bonum & æquum inspiciamus, dominium rerum captarum, nulla lege, neq; diuina, neque humana, a veris dominis, in eum qui iustus hostis non est, transire possit, vnde recuperatas huiusmodi res omnino dominis restituendas esse, ipsa ratio,

<sup>a</sup> Reg. l. 26.  
 & 31. tit. 5.  
 par. 2. Reg. l.  
 13. tit. 9. p. 5.  
<sup>b</sup> §. ult. D. de  
 rei vend.

<sup>c</sup> l. hostes. l.  
 latrones. l.  
 postliminiũ.  
 §. a piratis.  
 D. de captiui.  
 l. qui a latro  
 nibus. D. de  
 testam.  
<sup>d</sup> l. latrones.  
 D. de captiui.

<sup>e</sup> Reg. l. 31.  
 tit. 29 par. 2.

ratio, & æquitas suadet. nisi fortè propter vtilitatē publicam, quo milites sint alacriores ad perfequendos latrones & piratas, aliud statui conueniat. præsertim cum bono publico, etiam cum damno priuatorū, consuli possit<sup>a</sup>. Quò spectat, quod Tacitus ait, omne magnum exemplum, habere aliquid ex iniquo, quod contra singulos vtilitate publica rependitur. alioqui certè istud satis durum videtur. Romani autem, nō solūm, si cum latronibus & piratis, sed etiam si cum iusto hoste res esset, sæpe ea, quæ in præda fortè facta inueniebantur fuisse sociorū, vel ciuium, iuebant illis restitui. itaque Volscis ad deditiōem cōpulsis, castrisque eorum captis, prædæ pars, sua cognoscentibus Latinis, atq; Hernicis sociis populi Romani, reddita sunt<sup>b</sup>. & Sutrinis, sociis populi Romani, vrbs eorum, quam per pactiōem Hetruscis dederāt, quòd diutius obsidionem ferre non possent, eodem die Camillo duce recepta, inuiolata, integraque ab omni clade belli, ante noctem reddita est<sup>c</sup>. Sic quoque Scipio capta Carthagine, quæ repleta erat statuis, donariisque Græcanicis Sicilia aduectis, edixit, vt e singu-

<sup>a</sup> l. Lucius.  
D. de encl. l.  
item si verberatum. §. 1.  
D. de re vend.  
c. licet. de reg.  
iur. in 6.

<sup>b</sup> Livius l. 4.

<sup>c</sup> Livius l. 6.

DE IVRE ET OFF. BELL.

a *Plut. in a-*  
*poph.*
40
 lis vrbibus venirent, qui suadinoscerent  
 & auferret a, Sed istud certè ex benigni-  
 tate imperatoris, in cuius arbitrio omnè  
 prædam esse docuimus, pendet. Verùm,  
 vtrùm res furto\* a latronibus, & illegiti-  
 mis hostibus erepta, quæ postea in po-  
 testatem eorum, qui hostium numero  
 continentur peruenerit, a ciuibus com-  
 mercio, vel virtute bellica redèpta fue-  
 rit, vtrùm, inquâ, hæc res, priori domino  
 restitui debeat, meritò dubites. Et qui-  
 dem Iauolenus <sup>b</sup>, seruùm surreptum,  
b *in l. latro-*  
*nes. D. de ca-*  
*ptiu.*
 quamuis postea in manus hostium ve-  
 nerit, ab emptore vsucapi non posse, re-  
 spondit. quia scilicet verum esset, eum  
 surreptum esse, neque quòd hostiũ fui-  
 fet, aut postliminio rediisset, ei rei impe-  
 dimento esse. quod in seruo admitto,  
 propter ius postliminij: sed in aliis rebus  
 quæ postliminio carent, id sequi non au-  
 sim. quia certum est, hanc rem factam  
 hostium, atque ita dominum eius do-  
 minio excidisse. quid enim refert an do-  
 mino, an verò furi res fuerit erepta, mo-  
 dò iusto bello? Nam quod dicimus, vitiũ  
 furti, quod rei cohæret, non purgari, nisi  
c *l. 4. §. quod*  
*autem D. de*  
*vsucapio.*
 res in domini potestatem reuertatur:  
 (quod lege Atinia sancitum fuit <sup>c</sup>) inter  
 ciues,

ciues, non etiam inter hostes locum habere existimo. vt enim res bello capta nostra fiat, sufficit rem hostilem esse<sup>a</sup>. & hæc sententia mihi videtur iuri consentanea. tamen non impedio, quo minus vnusquisque vtatur suo iudicio. nihilominus si placet, hanc rem furtiuam manere; illud certè æquissimum puto, vt nõ aliter cum his possessoribus agi possit, quàm si ipse fur, vel hæres soluendo nõ sunt<sup>b</sup>. Et hætenus quidem de rebus corporalibus, & personis tam liberis, quàm seruis bello captis, dictum est. sed quæri potest, vtrùm etiam res incorporales<sup>c</sup> bello capi possint, & in victorem transferri: & si possint; vtrùm sint postliminij, nec ne. Quò spectat lis illa, quæ fuit inter Thebanos\* & Thessalos: de qua Quintilian.<sup>c</sup> mentionem facit. cum enim Thebas euertisset Alexander, inuenit tabulas, quibus centum talenta mutuò Thessalis dedisset Thebanos continebatur. has donauit Thessalis; quòd eorum vsus esset cõmilitio. postea restituta a Cassandro, conueniunt Thebani Thessalos. lis omnis ex ec, quòd Alexãder eas Thessalis donasse dicitur, pender. & certè non videtur potuisse Alexandrum,

<sup>a</sup> *L. naturalis.*  
*25 sine. l. trãf.*  
*fugam. D. de*  
*acq. rer. dom.*

<sup>b</sup> *Argumento*  
*l. 4. §. antep.*  
*D. de pecul.*

<sup>c</sup> *lib. 5. c. 12.*

DE IVRE ET OFF. BELL.

drum obligationem istam Theffalis donandi animo remittere, cum sit iuris, & ita personæ cohæreat, vt ab ea diuelli nō

a l. 3. & ibi  
Accurt. D. pro  
foco. l. quod  
debetur. D. de  
peculso.  
b l. si quid  
bello. D. de  
captis. §. nē  
ea que ab  
hostibus in-  
stit. de rer. di-  
uis.  
c l. si quid  
bello. D. de  
captis.  
d l. heredes. D.  
de petito.  
hered.  
e d. l. si quid  
bello.

possit a. præterea ex eo, quod ius, quod incorporale est, manu apprehendi non possit: id verò tātum fieri victoris, quod ipse cepit<sup>b</sup>. imo nō diutius esse victoris, quam quamdiu possidet: cum eodem iure, quo ipse cepit, ab eo auferri possit<sup>c</sup>.

& aliam quoque esse conditionem heredis constat, aliam victoris: quia ad illū ius<sup>d</sup>, ad hunc res transit<sup>e</sup>. tum etiam ius publici crediti transire in victorem non potuisse, ex eo defendi potest, quod id quod populus credidit, ab omnibus de-

beat<sup>f</sup>, & quamdiu quilibet superfuerit, sit is totius summæ creditor: imo idem populus dicendus sit, & eadem ciuitas: etiam si nemo ex iis, qui tempore con-

tractus erāt, superfit, sed alij successerint: vt disertè Alphenus respondit<sup>f</sup>. etenim populi ius, non est situm in personis, sed in vniuersitate; quæ vniuersitas \* æquè 43 representatur per successores, vt per eos, qui sunt hodie. eoq; sensu dicitur, quod vniuersitas non moritur, nec desinit,

quamdiu vel vnus superest<sup>g</sup>. Denique ad propositam facti speciem, dici potest, non

f in l. propo-  
nabatur. D. de  
ind. adde l.  
quod ius rerū.  
§. ult. & l. si  
grega. D. de  
legat. 1.  
g l. sicut. §.  
ult. D. quod  
cum vn.  
nom.

non in tabulis fuisse ius, cùm scriptura non sit de substantia contractus, sed adhibeatur tātum ad probationem <sup>a</sup>. vnde tabularum apprehensione, & donatione, nullum ius fuisse acquisitum Alexādro, neque Thebanis ademptum. Ceterum his non obstantibus, in proposita facti specie, verius videtur, ius publici crediti in tabulis comprehensum, in Alexandrum transisse, atq; ita potuisse Alexandrum, obligationem illam, qua Thessali Thebanis tenebantur, Thessalis remittere. quod donatione tabularum fecisse censetur. cùm enim iure belli, victi in victoris potestatem & dominiū transeant, & possit victor iis, quemadmodū velit, imperare; non solum res corporales iis adimere potest, sed etiam ea, quæ sunt iuris, & leges pro arbitrio dare, & priores tollere. vbi enim omnia ei, qui armis plus potest, vt ait Liuius, dedita sunt: quæ ex iis habere victor, quibus multari eos velit, ipsius ius atque arbitrium est. sed & cùm obligatio sit in creditoris dominio <sup>b</sup>; protinus ius crediti, quod victi habebāt, in victoris dominium, vna cum victis trāsit. nam qui in aliena potestate est, nō potest quicquam habere in sua <sup>c</sup>.

<sup>a</sup> l. contrahitur. D. de pignorb. l. cūm te. C. de trasf. l. in re. D. de fide instruo.

<sup>b</sup> l. 1. §. id quod. D. ad l. Eale. l. sed et si damnū. §. 1. D. de pecul. Accurt. in l. 2. C. de here. vel act. vend. c. l. qm in seruitute. D. de reg. iur.

Vnde

DE IVRE ET OFF. BELL.

Vnde profectò videtur dominiũ illius obligationis, qua Theffali Thebanis tenebantur, in Alexandrum transisse. qui cùm eandem donandi animo Theffalis remiserit : (nam tabulis donatis cēsetur id, quod in tabulis cōtinetur, donatum

a l. 1. c. de donat.

b l. 2. D. de pact. l. mortis causa. § Tisia D. de mort. caus. donat.

c l. in bello. § codicilli. ver. Cetera. D. de captiv.

d l. si captivus. § expulsi D. de capt. c. l. si ager. D. quem ad vsus. amit. f. milt. de reb. corp. & in corp. g. l. cum loca. D. de relig. et sumpt. fune.

esse <sup>a</sup> : & creditor cautionem creditori reddens, pacisci de non petendo intelligitur <sup>b</sup>) Theffalos ab obligatione liberos esse consequens est. nisi dicamus, Thebanos restitutione Cassandri, iure postliminij ius crediti recuperasse. nam omnia, quæ sunt iuris, postquam quis postliminio rediit, perinde habentur, ac si nunquam in potestate hostium fuissent <sup>c</sup>. itaque dicemus, ciuitatem iure postliminij restitutam eãdem, eiusdemque iuris, & status fingi, quo antea fuerat : vt de agrorum captorum, & liberatorum proprietate diximus <sup>d</sup>, & eorundem vsufructu <sup>e</sup>, qui iuris est. quo etiam modo postliminium fingitur in locis sacris & religiosis. Si tamen in proposita hypothesi, fortè Theffali Alexandro victori, in quem ius crediti transisse diximus, soluissent : non existimo Thebanos per restitutionem Cassandri, iure postliminij, ius crediti semel extinctum, recuper-

peraturos fuisse: vt in simili ferè facti specie, iudicatum fuisse tradit Ioan. Paponius<sup>a</sup>. solutio enim debitè facta fuit, quæ obligationem tollit funditus ipso iure<sup>b</sup>, & naturaliter, vt ait Iurisconsultus<sup>c</sup>. naturale est enim vnumquodque dissolui, ita vt colligatum est<sup>d</sup>. Ius autè postliminij non restituit ea, quæ facta, & naturaliter legitimè sublata sunt<sup>e</sup>. non habent namque ea, quæ sunt iuris, imperium in ea, quæ sunt facti<sup>f</sup>. Quò spectat, quod quâuis seruus ne naturaliter quidem obligetur<sup>g</sup>: tamè si quis pro seruo, qui mutuum accepit, soluat, vel ipse seruus manumissus, solutū repeti non potest<sup>h</sup>: quia scilicet factum facta repedit. est enim apta & commoda proportio, & analogia facti cum facta; non æquè iuris cum facta<sup>i</sup>: sed iuris cum iure maximè<sup>k</sup>. vnde si acceptilatione, pacto de non petendo, chirographi redditione, quæ longè minus cautionis habent, quam solutio<sup>l</sup>, liberatio contigerit, cum nullum factum interuenerit, ius crediti ad Thebanos, iure postliminij redire, dicendum videtur. neque enim his modis æquè tollitur obligatio, vt solutione, quæ obligationem tollit funditus ipso iure<sup>m</sup>.

neque

*mod. toll. oblig. l. sed et si lege, §. certè, D. de petit. hered.*

*a in Arest. l. 5. tit. 6.*

*b l. sed et si lege, §. certè, D. de petit. hered.*

*c in l. part. D. de solut. Ac-*

*cure, in l. solu-*

*tionem. D. de solutio.*

*d l. nihil tam naturale. D. de reg. iur.*

*e l. in bello. §. facti. D. de captiui.*

*f l. si vnum. §. pactus ne pe-*

*teret. D. de pact. l. iura*

*sanguinis. D. de reg. iur. l.*

*cū proponas. C. de her. inst.*

*g l. nec seruus. D. de pacul. l.*

*in personā. D. de reg. iur.*

*h l. in naturali-*

*ter. l. si id quod. D. de*

*cō dist. unde. i §. nec per*

*acceptilatio-*

*ne. inst. quib. mo. toll. oblig.*

*k l. omnia. D. de reg. iur.*

*l d. §. nē, et §. prsterca. inst. de excepte. C.*

*l. pecunie. C. de solut.*

*m inst. quib.*

## DE IVRE ET OFF. BELL.

a l. bona fides. D. de reg. iur.

neque etiam militat eadem æquitas, & bona fides. quæ non patitur, vt idem bis soluatur<sup>a</sup>. Et quidẽ, si hæ tabulæ, de quibus agimus, ab alio quopiã quàm summo principe, qualis fuit Alexâder, captę fuissent: equidem existimo nullum ius illi acquiri potuisse, per ea quæ in contrariam sententiã adduximus: atque ita non esse opus postliminij fictione: ne quidẽ si sint tabulæ priuati alicuius crediti, nisi fortè creditor eius, qui tabulas habet, captiuus sit: qui olim fiebat seruus, qui nihil suum habere poterat: sed omnia cum ipsa persona in dominium transferebãtur<sup>b</sup>. Verùm cum hodie inter Christianos capti, non fiant serui, aliud dicendum videtur. cum enim persona non transeat in dominiũ capientis: ne quidem ius, quod personæ ita cohæret, vt ab ea diuelli non possit<sup>c</sup>, transire dicendum est.

b l. acquiratur. § igitur. D. de acq. rer. dom.

c l. 3. et ibi Accurs. D. pro socio.

## DE FIDE HOSTI SERVANDA.

- 1 *Fidem Romani maximè coluerunt.*
- 2 *Fides hosti data, siue publicè, siue priuatim, seruanda.*
- 3 *Edictum quod metus causa, non pertinet ad fidem hosti datam.*
- 4 *Nulla*

- 4 *Nulla latebra, aut calumnia quærenda  
perituro.*
- 5 *Obsides dati, an liberent a fide præstita.*
- 6 *Iniuſto hoſti an ſit ſeruanda fides.*
- 7 *Iura belli non conueniunt iniuſti ho-  
ſtibus.*
- 8 *Conuentiones per tyrannidem, aut rebel-  
lionem expreſſæ, non ſeruanda.*
- 9 *Princeps ea, qua ſunt iuris regy, alienare  
non poteſt.*
- 10 *Summum imperium in quibus præcipue  
verſetur.*
- 11 *Minimè firma ſunt conuentiones, que  
ſunt cum ſubditis rebellibus.*
- 12 *Rebelles & latrones armis, non pacto  
ſubigendi.*
- 13 *Hoſtibus non ſemper fides ſeruanda.*
- 14 *Iuramentum de re illicita non eſt ſer-  
uandum.*
- 15 *Fides a priuato in præiudicium reipubl.  
data, non eſt ſeruanda.*
- 16 *Præſtat non dare fidem de re illicita, quàm  
datam fallere.*
- 17 *Hoſti fidẽ fallenti non eſt ſeruanda fides.*
- 18 *Indutia an maneant hoſte eas violante.*
- 19 *Indutia etiam longi temporis eſſe poſſunt.*
- 20 *Fidem frangenti, fidem ſeruandam non  
eſſe, quomodo intelligendum.*

21 *Perſi-*

DE IVRE ET OFF. BELL.

21 *Perfidiam perfidia ulcisci non licet.*

22 *Pañtum dolo malo inñtum, an seruãdam.*

CAP. SEXTVM.

**F**ide nullam rem apud nortales ma-  
iorem, aut sanctiorem veteres sem-  
per existimauerunt; eamque Romani in  
capitolio, vicinam Ioui opt. max. esse  
voluerunt: qua semel data, nihil firmitus  
fuit. Itaque Aulus Gellius<sup>a</sup>, omnibus  
quidem populum Romanum virtutum  
generibus colendis, exercendisque, ad  
tãtam amplitudinem peruenisse scribit;  
sed omnium maximè, atque præcipuè  
fidem coluisse, sanctãque habuisse, tam  
publicè quàm priuatim. cuius rei cùm  
permulta exstent argumẽta, & testimo-  
nia, tum illud perquàm memorabile;  
quòd inter eos, & Perseam pactis indu-  
tiis, cùm ludi Circenses celebrarentur,  
ingressi hostium duces curuli certami-  
ne contenderint, & victores coronati  
sint. Sed & cõsules clarissimos viros, po-  
pulus Roma. confirmandæ fidei publicæ  
gratia, hostibus dedidit, vt de Postumio  
& Mancino alibi diximus<sup>b</sup>. vnde Ptolomæus  
Ægypti rex, agnita Romanorum  
fide, populum Roman. infanti filio, cui  
regnum

<sup>a</sup> noct. Attico  
lib. 20. cap. 1.

<sup>b</sup> 3. cap. 1.

regnum debebatur, tutorem testamēto reliquit. & certè, vt Vlpianus ait, graue est fidem fallere<sup>a</sup>: & nihil fidei humanæ tam congruum est, quàm seruare, quæ placuerunt<sup>b</sup>. Porrò nullum, vt inquit Cicero<sup>c</sup>, vinculum ad astringendam fidem iureiurādo maiores arctius esse voluerunt. id indicant leges in xij. tabulis: indicant sacra: indicant foedera, quibus etiā cum hoste deuincitur fides. & quidem Romani, cū belli, pacisque iura religiosissimè semper coluerint, tū certè, si tēporibus adducti, hosti quid promississent, in eo ipso fidem sanctissimè seruabant. Itaque præclarè Sex. Pompeius, magni Pōpeij filius, (cœnantibus apud eum in naui ad Puteolos Antonio & Octauio, cum quibus tunc societatem inierat) Menodoro Pompeianæ classis præfecto, per internuncium significanti tempus adesse, quo parentis, & fratris iniurias vlcisci posset, & occasione arrepta, paternum sibi asserere imperium: se enim curaturum, ne quisquā è nauibus euaderet: respondit: Vtinam Menodorus hoc absque me posset perficere. nam illi perurium conuenire, non Pōpeio<sup>d</sup>.

<sup>a</sup> in l. i. D. de cōst. pecu.

<sup>b</sup> in l. i. D. de pact.

<sup>c</sup> offic. lib. 3.

<sup>d</sup> Appian. de bell. civil. l. 5.

<sup>2</sup> Sunt autem\* qui existiment, hosti quidē

H publicè

DE IVRE ET OFF. BELL.

publicè fidem datam seruandam esse, nō  
 etiam eam, quæ a priuato sit præstita.  
 a Bart. et alij in l. conuentionum. D. de pact. Raz. in apolog. cōtra Eckium, & de Iude. qu. 3  
 quorū sententia nullis solidis argumētis fulcitur, est quæ contra veterum exēpla, institutaque maiorum, & grauissimorū Philosophorum sententiā. quam elegāter prosequitur Cicero<sup>b</sup>, & Gell.<sup>c</sup>  
 b offic. lib. 3.  
 c lib. 7. c. 18  
 lib. 20. cap. 1  
 itaque quando cum iusto, legitimoque hoste res geritur, non existimo deberē conditiones, pactiones bellicas & hostiles, perturbari periurio, etiam a priuatis initas<sup>d</sup>. nam graue est fidem fallere<sup>e</sup>. & sunt quædam officia, vt inquit Cicero<sup>f</sup>, etiam aduersus eos seruanda, a quibus iniuriam acceperis. est quæ præclarum in hanc rem M. Attilij Reguli facinus, qui primo bello punico captus a Pœnis, cū de captiuis commutandis Romanam missus esset, iurasset quæ se redituum: primū vt venit, captiuos reddendos in senatu non censuit; deinde cū retineretur a propinquis & amicis, ad supplicium redire maluit, quā fidem hosti datam fallere<sup>g</sup>. quod multis laudibus effert D. Augustinus<sup>h</sup>. Iacobus vero iratus fuit Simeoni & Leui filiis suis, quia violauerant pactum cum Sychimitis inikum<sup>i</sup>: ideoque moriens maledixit illis.

d per text. in c. mol. 23. q. 2 l. postumini, §. vii. D. de capti. Fortun. & Duareuus in l. conuentionum. D. de pact. Decius in l. ea est natura. D. de reg. iur. Conar. in 4. lib. decre. 2. par. c. 3. §. 4.  
 e l. 1. D. de const. pecun.  
 f offic. lib. 3.  
 g Cicero off. lib. 3. Val. Max. l. 1. c. 1.  
 h de ciuit. Dei lib. 1. cap. 18.  
 i Genes. 34.

illis<sup>a</sup>. Neque recipienda est eorum sententia, qui existimarunt, quod per vim hostium esset actum, ratum esse non debere. viro enim forti, vt inquit Cicero, vis adhiberi nequit: & fides, vt inquit Seneca<sup>b</sup>, sanctissimum humani pectoris bonum, nulla necessitate ad fallendum cogitur, nullo corrūpitur præmio. vnde Cicero: Nulla res tanta, inquit, existat, vt possit mihi maiorem vim adhibere  
 3 metus, quàm fides. Edictum<sup>\*</sup> quoque prætorium, quo per metum gesta, in integrum restituuntur, ad eum metum, qui iure licito, vtpote iusto bello inferatur, non pertinet<sup>c</sup>: neque ad promissa hostibus facta, sed ciuibus. Et quidem tanti olim fuit iusiurandum, vt M. Pomponius Tribu. pleb. cùm diem dixisset L. Manilio A. filio (quòd paucos sibi dies ad dictaturam gerendam addidisset, & criminaretur, quòd Titū filium, qui Torquatus postea est appellatus, ab hominibus relegasset, & ruri habitare iussisset) ab adolescente filio, qui intelligebat negotium exhiberi patri, remotis arbitris, stricto gladio iusiurandum dare coactus, se patrem missum esse facturū: quamuis nullo iure cogi posset: tamen

<sup>a</sup> Genes. 48.

<sup>b</sup> Epist. 89.

<sup>c</sup> text. eleg. in l. si mulier. in prin. D. de eo quod iur. caus. Panor. in c. Abbas. col. 3. in c. cùm dilectus. de his que vi. met. caus. Felinus in cap. cùm inter. nu. 20 de except. Dom. in d. c. ad omni vero. col. ult. dist. 5 Syluest. in vers. metus. q. 6.

DE IVRE ET OFF. BELL.

a causa destiterit, Manliumque missum fecerit<sup>a</sup>. Ita que pulchrè Ferrandus diaconus, ad Rheginum ducem, de officio pij & veri Christiani ducis militum scribens, censet hostem, ut cunque antiquum, & reip. infestum, non esse falsa iuratione fallendum: etiam si vita eius impediat, mors pro fit paci. humanis enim diuina semper sunt preponenda, & ut Petrus apostolorum princeps dicebat, Deo magis seruiendum est, quam hominibus<sup>b</sup>. Quare cum quibuscunque bella suscepta sunt, ut idem Ferrandus ait, aut nulla fide data, bello aut pace facta, inuiolata fide iurifurandi resp. seruanda vel adiuuanda est. quid enim proderit eum vincere, quem diabolus vicit, ut victorie spe falsum iuraret? Propterea Psalmista<sup>c</sup>, dum canit: Domine quis habitabit in tabernaculo tuo, aut quis requiescet in monte sancto tuo? respondet sibi ipsi ex persona Dei, talibus verbis: Qui loquitur veritatem in corde suo, qui non egit dolum in lingua sua, nec fecit proximo suo malum, & opprobrium non accepit aduersus proximum. qui iurat proximo suo & non decipit. ille autem, ut idem Diaconus ait, iurat proximo suo, & non decipit, qui quod-

<sup>a</sup> Cicero. offic lib. 3. Livius lib. 7.

<sup>b</sup> Actor. 1.

<sup>c</sup> Psalm. 14.

quodcunque iurat lingua, implet opere. neque existimet quis, hostem, cui iurat, non debere proximum deputari. propter hoc enim iuratur, ut proximus deputeretur: & per fœdus pacis, ex hoste fit amicus. Maximum itaque nefas est, falsum iurare, & si alius consideres, maximè inutile, & damnosum imperatori, vel duci exercitus. nam præcipuum disciplinæ militaris vinculum est, sacramenti religio: quæ si, exemplo ducis, leuis æstimari incipiat, tam apud hostes, quàm apud milites, omnia misceri, perturbarique necesse est. neque etiam imperator fide data ab hoste tutus erit, neque suos fidos habebit. Quidquid proinde, iuramento intercedente, adhibita inuocatione nominis Dei confirmatur (sive inimico gratia, sive reo venia, sive militibus, re bene gesta, præmia promittantur) nullius utilitatis cõsideratione, nullius periculi formidine, debet fieri irritum: sed fixus, & immutabilis sit sermo, cuius fidei testis sit adhibitus Deus. Ca-

4 uendum\* præterea, ne latebra quæratur periurio, & calumnia quadam, & nimis callida, & malitiosa iuris interpretatione, iurifurandi fidem violemus. ut ille,

DE IVRE ET OFF. BELL.

qui, cùm triginta dierum pactæ essent  
indutiæ, noctu populabatur agros<sup>a</sup>. vt  
*a Cicer. offic. lib. 1.* Q. Fabius Labeo, quem nonnulli tra-  
dunt, cùm Antiocho præliò victo, ex  
foedere dimidiam partem nauium acci-  
pere deberet, omnes medias secuisse, vt  
regem tota classe priuaret<sup>b</sup>. & vt vnus  
*b Val. Max. lib. 7. cap. 3.* ex decem, quos, post Cannensem cladē,  
iuratos ad senatum misit Annibal, in ca-  
stra redituros, nisi de redimēdis captiuus  
impetrassent: qui, cùm paulò post quàm  
egressus erat e castris, rediisset: Romæ  
mansit. reditu enim in castra liberatum  
se esse iureiurando interpretabatur: nō  
rectè. fraus enim distringit, vt inquit  
Cicero, non dissoluit periurium. itaque  
decreuit senatus, vt ille veterator, & cal-  
lidus, vincētus ad Annibalem deducere-  
*c Cicer. off. lib. 3. LIMIUS lib. 22.* tur<sup>c</sup>, & huc referri posse videtur respō-  
*d de bello pu- ni.* sum Censorini, si Appiano credimus<sup>d</sup>:  
qui legatis Carthaginensium (qui que-  
rebantur, quòd contra fidem ipsis datā,  
obsidibus traditis, atq; omnibus armis,  
adhuc Carthaginem delere vellet) re-  
spondit, per Carthaginem, quam liberā  
fore promiserant Romani, Carthagi-  
nienses intelligi, non urbem & solum.  
Neque verum<sup>\*</sup> est id quod nonnulli ar-  
bitrantur,

bitrantur, obsidibus datis, quempiã a fi-  
 de data liberari. qua ratione Bodinus<sup>a</sup>, a de repub. l. 1. cap. 8. -  
 Franciscum Gallorum regem religione  
 fœderis Madriciani, filiis obsidibus da-  
 tis, solutum fuisse contendit: exemplo  
 pacis Caudinæ, quam ideo irritam factã  
 asserit, quòd obsides dati essent: idque  
 contra fidem historiæ. nam ipse Postu-  
 mus cons. pacis auctor, sententiam ro-  
 gatus, ideo dixit populum Romanum  
 sponsione, quam ipse cum Samnitibus  
 fecerat, non teneri, quòd iniussu populi  
 facta esset: sic enim ait: Neque ego infi-  
 cias eo, P. C. tam sponsiones, quàm fœ-  
 dera sancta esse, apud eos homines, a-  
 pud quos iuxta diuinas religiones, fides  
 humana colitur: sed iniussu populi, ne-  
 go quicquam sanciri posse, quod popu-  
 lum teneat. se tamen seu turpi, seu ne-  
 cessaria sponsione astrictum affirmavit.  
 ideoque quòd populus religione libera-  
 retur, & pax Samnitum repudiaretur, vt  
 ipse cum reliquis pacis auctoribus de-  
 deretur, suasor & auctor fuit. cùm equi-  
 tes D. C. obsides dati essent, qui capite  
 luerent, si pacto non staretur <sup>b</sup>, obsides b Liuius l. 9. Cicero off. l. 3  
 enim, quemadmodum fideiussores, &  
 pignora, principali obligationi accedunt,

DE IVRE ET OFF. BELL.

*a institut. de fideiuss. in pr. l. 1. §. verbum. D. de obli. & actio. b i. fideiussoribus obligatis. in prin. D. de fideiuss. l. si qui promissit. D. de pigno. Alciat. de sing. ceri. c. 44. c l. cum principalis. D. de reg. iur. l. 1. D. com. prad.*

quò diligentius cautum sit aduersario<sup>a</sup>. & tantùm abest vt principalem obligationem tollant, vt sine ea consistere nequeant<sup>b</sup>. non enim magis possibile est, accessorium sine principali esse, quàm accidens sine subiecto, in quo est<sup>c</sup>. Debit itaque Franciscus, si non publica, quoad ea fortè, in quibus populi & ordinum consensus requirebatur, saltem sua liberata fide, potius in carcerem redire, quàm fidem datam fallere: exèplo Postumi, Mancini, Reguli, & aliorum. eoquè magis, quòd princeps, cui populus omne imperium in se, potestatemq; concessit<sup>d</sup>, rectè de negotiis ad remp. spectantibus paciscatur, siue pacem, siue quamcunque conuentionem cum hostibus faciat<sup>e</sup>. Rectius itaque Ioânes Gallorū rex, in prælio ab Anglis captus, & fide de reuertèdo data dimissus, si minus pacta implerentur: cum omnia præstare non possèt, quæ conuenerant, ad hostè redire maluit, quàm fidem violare, cum tamen & ipse filium obsidem dedisset<sup>f</sup>. Et hæc quidem, quæ de fide hosti seruanda diximus, inuiolabiliter tenenda sunt, si cum iusto & legitimo hoste res geratur; sin verò quis metu fortè compulsus,

ab eo

6 ab eo qui iustus hostis\* non est, fidem de  
 precio redemptionis soluendo, vel simili-  
 bus dederit, eum non astringi, vt fidem  
 seruet, dicendum est<sup>a</sup>. ideoque si p̄do-  
 nibus, vt inquit Cicero<sup>b</sup>, pactum pro  
 capite precium nō attuleris, nulla fraus  
 erit: ne si iuratus quidem id nō feceris.  
 pirata enim non est ex perduellium nu-  
 mero definitus, sed communis hostis  
 omnium: cū hoc nec fides esse debet,  
 nec iusiurandum commune. & hinc est,  
 quōd latrones, & p̄dones hostium vo-  
 cabulo non contineri dicāt I. C.<sup>c</sup> Vnde  
 7 iura belli\*, captiuitatis, & postliminij,  
 quæ hostibus tantum conueniunt<sup>d</sup>, nō  
 possunt latronibus conuenire<sup>e</sup>. atque  
 ideo capti a piratis, & latronibus, omni-  
 no liberi permanent<sup>f</sup>. Cū itaque iure  
 belli agere, sibi que acquirere iis tantum  
 permittitur sit, qui iusti sunt hostes<sup>g</sup>:  
 nullo iure ij qui non sunt hostium nu-  
 mero definiti, quibus iura belli nō sunt  
 concessa, de his, quæ iustis tantum hosti-  
 bus acquiruntur, pacisci, aut ad paciscē-  
 dum metum inferre poterunt<sup>h</sup>. quare  
 edicto p̄toris, quo per metum gesta  
 rescinduntur, locus erit<sup>i</sup>. imo ipso iure  
 non tenebit, quicquid ex hac causa actū

<sup>a</sup> per text. in  
 c. peruenit. c.  
 sicut. et infra.  
 de iuratur. c.  
 sollicitè, de  
 rest. spoliat.  
<sup>b</sup> off. lib. 3.  
<sup>c</sup> in l. hostes.  
 D. de captiu.  
 in l. hostes. D.  
 de verb. signi.  
<sup>d</sup> in l. postli-  
 minium, in  
 princ. D. de  
 captiu.  
<sup>e</sup> d. l. hostes.  
<sup>f</sup> l. postlimi-  
 nium. §. pra-  
 tis. D. de capti-  
 u. l. qui a latro-  
 nibus. D. de  
 testam. l. 1. D.  
 de leg. 3.  
<sup>g</sup> d. l. hostes,  
 et d. §. a pira-  
 tu, cū similib.  
<sup>h</sup> per text. e.  
 leg. in c. sicut  
 Et infra. et c.  
 peruenit. 1. de  
 iuram. c. Ab-  
 bas de his que  
 vi met. can.  
<sup>i</sup> d. c. Abbas.  
 l. 1. D. quod  
 met. cau. l. 1.  
 c. eod.

DE IVRE ET OFF. BELL.

*a i. qui in carcerē. D. quod met. causa.*  
*b l. nō est dubiū. C. de legi.*  
*c c. peruenit. 1. c. verum. de iureiu.*  
*d d. c. peruenit. & d. c. si cut & infra de iureiur.*  
*e l. si piguore. l. si prædo. D. de pig. actio. l. 1. §. si prædo. l. bona fides. D. de positi. l. ita ut si fur. D. commodat. l. non a iudice. D. de iudic.*  
*f l. bona fides §. incurrit. D. de positi.*  
*g d. l. hostes.*  
*h ex. qui sint rebell. i l. ita Fallo. D. de furt.*

vel promissum fuerit<sup>a</sup>: neque iuramēto stabilietur: quia quod nullum est, confirmari nō potest<sup>b</sup>, & nullum vinculum continere dicitur, iuramentum atroci, & nefanda coactione extortum<sup>c</sup>. poterit tamē ad maiorem cautionem absolutio peti, quę facilē concedi debet<sup>d</sup>. Non obstat his quę diximus, quod leges prædoni actionem pignoratitiam depositi, & commodati, tribuant<sup>e</sup>. id enim verum est, si cum alio contrahat, quàm qui læsus est. quamvis enim prædo sit, respectu eius cui rem abstulit: tamen prædo non est, respectu eius, cum quo contraxit. quoniam bona fides in contractibus æstimanda est, inter eos tantum, qui contraxerunt, nihil extrinsecus assumpto<sup>f</sup>. Porro quod de latronibus, & prædonibus diximus, idem & de rebellibus dicendum est: qui iusti hostes dici nō possunt<sup>g</sup>. nam aliud est hostis, aliud rebellis<sup>h</sup>. & iniquum est, ut quis ex improbitate sua lucrum sentiat<sup>i</sup>. quamvis verū sit, generali nomine, ex usu loquendi, hostes vocari omnes, contra quos arma feruntur. His consequens est, conventiones illas\*, quę per tyrannidem extor- 8  
 quentur, seruādas non esse. neque enim  
 consen-

consensu (qui in omnibus contractibus a l. 2. 3. D. de requiritur<sup>a</sup>.) factum videtur, quod per vim exprimitur. ideoque ex hac causa gestum, nullius erit momenti<sup>b</sup>. Itaque tyrannorum leges, non esse leges docet Cicero<sup>c</sup>: neque legem Valeriam, quam L. Valerius Flaccus interrex a senatu proditus, destituta consulibus ciuitate, Carbone & Mario interfectis, armis Syllæ oppressa repub. tulit; vt Sylla perpetuus dictator reipubl. constituendæ causa crearetur: & quæcunque is, aut tãquam consul, aut tanquam proconsul gessisset, rata essent. quam omnium legũ iniquissimam, dissimillimamque legis esse, idem Cicero ostendit<sup>d</sup>. Idem prorsus de illis conuentionibus, quas iniustus populus, quem etiam tyrannum vocat Cicero, per rebellionem a principe suo extorquet, dicendum erit. & quidem si a plerisque dubitatum est, an princeps ex cõtractu cum subditis obligetur<sup>e</sup>: quid de conuentionibus publicis dicendum est, quas subditi per rebellionẽ, & summam perfidiam extorquẽt? etenim cum rebelles eo ipso, quòd in principem insurgunt, fidem violẽt, frustra sibi seruari fidem postulant. de quo mox dicemus.

a l. 2. 3. D. de  
obli. & actio.

b d. l. qui in  
carcerẽ. D. de  
eo quod met.  
caus. l. si per  
impressionẽ.  
C. de hiis que  
vi met. caus.  
c. conuentior. 23  
quest. 8.  
c de legib. l. 1

d in orat. 3.  
contra Rullũ.  
e Barto. in l.  
prohibere. §.  
planẽ. D.  
quod vi. Bal.  
in c. 1 de nat.  
feu. in c. 1. cõ.  
de probatio. in  
l. vlt. C. de  
trãf. panor. in  
c. nouit. de iu-  
dic. Specul. in  
tit. de iust. e-  
dit. §. nũc vñ-  
dendum. An-  
chor. consil. 2.  
Felinus in c. 1  
de probatio-  
nib. & alijs  
quos refert Bo-  
dinus de rep.  
lib. 1. cap. 9.

tum

DE IVRE ET OFF. BELL.

tum etiam, quod foedus ratum, quam fidem sanctam apud eos fore sperandum est, qui diuini, humanique iuris violatores, per summum nefas & perfidiam, patriam prodere non sunt reueriti? aut quomodo per Deum iurabunt, cuius ordinationi ipsi resistunt? aut quæ conditio pacis esse potest, in qua ei, cum quo pacem facias, nihil concedi potest<sup>a</sup>? Sed & cum iniusti sint hostes, iure belli agere non possunt, ut modo ostendimus. nulla enim, ut inquit Cicero, iusta causa videri potest aduersus patriam arma capiendi: & per consequens, aduersus principem: qui est communis omnium parens<sup>b</sup>: quique potestatem, quam habet, a Deo accepit<sup>c</sup>. Præterea cum populus de rebus ad remp. spectantibus, ne quidem cum extraneis pacisci possit, quod soli principi concessum est<sup>d</sup>: cui tota respublica commissa est<sup>e</sup>, & penes quem est belli, pacisque arbitrium<sup>f</sup>: multo minus principem ad iniquas condiciones adigere poterit. princeps enim, cuius est leges dare populo, non accipere<sup>g</sup>, cum legibus solutus sit<sup>h</sup>, nullis legibus astringi potest a suis subditis. nemo enim, ut ait Vlpianus, sibi ipsi imperare potest, & coacti

<sup>a</sup> Cicero. Phi.  
lipp. 12.

<sup>b</sup> Auth. neq;  
vir. quod ex  
donat. in fin.  
<sup>c</sup> Paulus ad  
Roman. c. 13

<sup>d</sup> l. conuentio-  
nũ. D. de pac.  
<sup>e</sup> l. 1. D. de  
cõstit. princip.  
<sup>f</sup> c. quid cul-  
patur. 23. q. 1  
<sup>g</sup> c. Dominus.  
23. quest. 2.  
<sup>h</sup> l. 1. D. de  
constit. princ.  
h l. princeps.  
D. de legibus.

& coacti, & cogentis officio fungi<sup>a</sup>. & nulla obligatio consistere potest, quæ a voluntate promittentis statum capit b. eoque spectat, quod Canonistæ passim tradunt, Pontificem nunquam sibi manus ligare. & hæc quidem multo magis obtinebunt, si princeps ex hoc cōtractu sit læsus: qui vt minor restituitur<sup>c</sup>. & omnium maximè, si maiestati principis quid detrahatur. summi enim principes<sup>d</sup>, quemadmodum nullā regni partē alienare possunt<sup>d</sup>: (cuius sunt tātūm vfructuarij, vel dñi: sed non secus, quàm maritus est dñs dotis, quā alienare non potest<sup>f</sup>.) sic nec quidquā ex iis, quæ maiestati eorū cohærent, & sunt iuris regij. itaq; de facto alienata, ad ius pristinū reuocari debēt, & successores ex hoc cōtractu nō obligantur<sup>g</sup>. omnia enim illa, quę sunt iuris regij, nō sunt in cōmercio, sed coronæ annexa, ita vt ab ea separari nō possint<sup>h</sup>: neq; per ipsum principē alienari, etiam ex certa sentētia, vel motu proprio<sup>i</sup>. eoque spectat, quod Caius respondit, ea quæ sunt iuris diuini, vel publici, nullius in bonis esse<sup>k</sup>. neque etiam

hic

Ioan. probat Ompha & alij, quos allegat & sequitur Carolus Molinæ in consuetud. Parisien. tit. 1. gloss. 5. nu. 23. Bart. Iaf. Cyn. & alij, quos citat Bodin. de rep. l. 1. c. 10. k in l. 1. D. de rer. diuis.

a l. ille à quo. §. tempesti-  
us. D. ad S. C.  
Tribell. l. pen.  
D. de arbit.  
b l. a Titio.  
§. nulla. D.  
de verb. oblig.  
c l. resp. C. qui  
ex cau. maio.  
d Bald. in au-  
then. hoc am-  
plius. C. de fi-  
dei cōmis. latē  
Ioā. Papon. in  
arrest. lib. 5.  
tit. 10.  
e l. doce an-  
cillam. C. de  
rei vend.  
f instt. quib.  
alien. licet. in  
prin.  
g l. peso. §.  
fratre. D. de  
legat. 2. l. oēs  
funds. C. de  
funds patrim.  
lib. 11. l. 2. C.  
de apparit.  
procōs. legat.  
lib. 12. l. 2. C.  
de fund. limit.  
lib. 12.  
h l. cum ser-  
uus. al. apud  
Iulianum. §.  
constat. D. de  
leg. 2. l. vlt. D.  
vt in pos. leg.  
i d. l. oēs fundi.  
et d. l. 2. et de-  
cedit Andr. I-  
ser. Luc. pen.

DE IVRE ET OFF. BELL.

a c. ut super.  
de reb. eccl. nō  
alien. c. intel.  
lecto. de iure.  
iur.

b d. l. omnes  
funds. C. de  
fund. patr. l. 1.  
11. et d. l. 2.  
C. de fund. li-  
mit. l. 12. cum  
similib.

c l. legatus  
Caesaris. D. de  
off. praesid.  
d. l. alia. §. 1.  
D. solut. mar.

e Bald. in c. 1  
nu. 3. quae sunt  
reg. Fel. in c.  
cum nō liceat.  
in c. ad audien-  
tiam. de pre-  
script. Anto.

Butr. in c. per  
venerabilem.  
qui sint filij  
legit. Abbas  
in d. c. cum nō  
liceat : quos  
refert et sequi-  
tur Zoānet. de

Rom. Imper.  
§. l. sacri affa-  
tius. C. de di-  
uers. rescript.  
l. 2. C. ut ne-  
mo priuatus

tit. praed.  
g Dion. Hal.  
ant. Rom. l. 5.  
lx de rep. l. 1.  
et vlt.

hic quicquam operabitur iuramentum. prohibitio enim alienationis, quæ est in rei conditione, facit, vt sit illicitum iuramentum postea præstitum<sup>a</sup>. & quidem si illa, quæ sunt reipub. vel regni, neque alienari, neque longi temporis præscriptione acquiri possunt<sup>b</sup>: quomodo illa, quæ sunt regix maiestati in signum supremæ potestatis reseruata, illi auferri poterunt, cum nec sponte se abdicando princeps imperiū amittat<sup>c</sup>? & si pactū, quo maritus paciscitur, ne conueniatur in id quod facere potest, sed in solidum: seruari oportere negat Vlpianus, tanquam contra bonos mores sit: quippe contra receptam reuerentiam, quæ maritis exhibenda est<sup>d</sup>: quid de pacto, quo maiestas principi diuino & humano iure debita lēditur, dicendum est? in quam sententiam multa a multis dicta sunt<sup>e</sup>. & hinc est, quod si quis priuatus vtatur titulis, vel insigniis regiis, capite plectatur, publicatis bonis<sup>f</sup>. & olim per legem Valeriam sacrum esset cum bonis caput eius, qui regni occupandi consilia iniisset<sup>g</sup>. Hinc quoque dicit Bodinus<sup>h</sup>, priuilegium concessum a principe, vt liceat condemnatum restituere, aut a pœna liberare

berare, nullius esse momenti. quia scilicet hoc dependet a maiestate principis: cui soli hoc licet <sup>a</sup>. & Baldus <sup>b</sup> dicit, non posse vlllo tēpore præscribi iuri appellandi ad summū principē <sup>c</sup>. porrò summum imperiū <sup>\*</sup>, vt rectè annotauit Bodinus <sup>d</sup>, præcipuè versatur in summis magistratibus creandis, & officio cuiusq; definiendo, in legibus iubēdis, aut abrogādis, in bello indicendo, ac finiendo, in extrema prouocatione ab omnibus magistratibus, & in potestate vitæ ac necis. neque enim si iudices supplicia de sceleratis sumunt, propterea necis ac vitæ ius habēt: cū legibus obstricti teneātur: nec merētes morte liberare possint: quod summi imperij est: vbi clementia cōtra leges locū habet. Itaque, exactis regibus, quidam dolebant mutatum reipub. statum, dicentes regem hominē esse, a quo impetres vbi ius, vbi iniuria opus sit: esse gratiæ locum, & beneficio: & irasci, & ignoscere posse: leges verò, rem surdam, & inexorabilem esse: nihil laxamenti, nihil veniæ habere <sup>e</sup>. & Cicero veniam pro Ligario precatus a Cæsare, Apud iudices, inquit, nunquam egi hoc modo: Ignoscite, iudices, errauit, lapsus est;

<sup>a</sup> l. i. in fine. D. de quest. l. ante damnatum, in fin. l. relegati. l. ad bestias. D. de pæn.

<sup>b</sup> in authent. quas successiones. m. 14. versic. ex his apparet. C. de sacro. eccle. c. text. in c. venientes. de iuris.

<sup>d</sup> in method. histor. cap. 6.

<sup>e</sup> Livius lib. 2

DE IVRE ET OFF. BELL.

est; non putavit, si vnquam posthac. ad  
parentem sic agi solet: apud iudices,  
Non fecit, non cogitavit: falsi testes, fal-  
sum crimen. Sunt itaque hæc, quæ dixi-  
mus, principis propria: quæ etiam po-  
pulus Romanus, apud quem summum  
imperium fuit, cum pleraq; alia senatui  
committeret, sibi reseruauit. vt multis  
locis ostendit Dion. Halic<sup>a</sup>. præsertim  
quòd ad magistratus creandi, leges ferē-  
di, & bellum pacemque decernendi po-  
testatem attinet. prouocationem verò,  
& vitæ necisue potestatem, populo per  
legem Valeriam tributam fuisse cōstat<sup>b</sup>.  
& hæc quidem, iureconsultorum opi-  
nionem, ita maiestati principis cohærent,  
vt cum aliis communicari non possint.  
& superioribus addunt, pignerandi cō-  
cessionem, vectigalium ac tributorum,  
nummiq; percutiendi potestatem, &  
alia nonnulla. ex quibus tamē quædam,  
etiam iis, qui nō sunt summi principes,  
tributa videmus<sup>c</sup>. & de his omnibus la-  
tè Ioan. Pap<sup>d</sup>. Porrò Bodinus, propter-  
ea\*, quæ hæctenus dicta sunt, dicit nullas  
conventiones minus firmas esse, & plus  
cautionis opus habere, quàm quas fa-  
ciunt subditi rebelles cum suo principe.  
ideo-

<sup>a</sup> *ant. Rom. lib. 2. 4. & 6.*

<sup>b</sup> *Dion. Halic. ant. Rom. l. 5. Lælius lib. 2. Val. Max. l. 4. cap. 1. Plin. in vita P. Valer. Publicola.*

<sup>c</sup> *Guido Papæ quest. 498. d. in arrest. lib. 5. tit. 1. cū aliquos sequē. tib. Bodin. de rep. lib. 1. c. 118.*

ideoque suadet rebellibus, ne ipsi contrahant: sed alius princeps extraneus, & vicinus, pro eis. at ego suaferim, ut redeuntes in viam, humiliter veniam orantes, poenitentia potius clementiam principis demereantur: quam iniustis & iniquis pactis animum irritent. nihil enim magis pungit principem, quam pacisci cum suis subditis rebellibus, iisdemque fidem seruare. itaque Philippum, ut refert Liuius<sup>a</sup>, vna res maximè angebat: <sup>a lib. 39.</sup> quòd cum leges a Romanis victo imponerentur, sœuendi ius in Macedones, qui in bello a se defecerant, ademptum erat. Cùm ergo conuentiones illæ non subsistunt, per quas maiestas principis imminuitur: quid de iis dicendum, per quas Diuina Maiestas læditur (cui per homines nullo contractu, longa quantumuis longi temporis præscriptione, derogari potest) in aperto est. itaque Themistocles ad Athenienses, & Cato ad Romanos dicebant, homines nihil quicquam eorum, quæ Diuinæ Maiestati deberentur, vñ capere posse: neque priuatos quicquam eorū, quæ essent reipub.<sup>b</sup> <sup>b Plut. in Them. & Cato Vices.</sup> ideoque Caius, ea quæ sunt diuini, vel publici iuris, nullius in bonis esse re-

I spondit.

DE IVRE ET OFF. BELL.

a in l. 1. D. de  
ver. divis.  
b epist. 33.

spondit<sup>a</sup>. & huc spectat locus ille nobi-  
lis Ambrosij<sup>b</sup>: ubi de Valentiniano im-  
peratore loquitur: Convenior, inquit, a  
comitibus & tribunis, ut Basilicæ fieret  
matura traditio; dicentibus, imperatorē  
suo iure uti, eò quòd in potestate eius  
essent omnia. respondi, si a me peteret,  
quod meum esset, id est, fundum meum,  
argentum meum, ius huiusmodi meum  
non refragaturum: quanquam omnia,  
quæ mea sunt, essent pauperum: verum  
ea quæ diuina, imperatoris potestati nō  
esse subiecta. Ceterum, quamvis conuē-  
tiones cum latronibus, & rebellibus, ra-  
tas non esse docuerimus, tamen prin-  
ceps, quantum potest, ab iis abstinere  
debet: tum quòd maiestati principis nō  
cōueniat, tum quòd quæuis mala potius  
toleranda sunt, quàm malo consentien-  
dum<sup>c</sup>. turpissimum<sup>\*</sup> autem iudicauere  
Romani, de bello, pace, vel indutiis cum  
piratis, latronibus, vel rebellibus pacifi-  
ci. itaque eos nunquam cum iis, qui im-  
perio Romano subiecti rebellarent, fœ-  
dere, aut pactione rem composuisse, le-  
gimus: quin potius non quievere, ante-  
quam expugnando, aut in deditionem  
accipiendo, omnes subigerēt; ut Latinis,  
Campa-

c citam. 32  
quest. 5.

12

Campanis, aliisque rebellantibus factū  
 fuisse legimus. ideoque Cicero <sup>a</sup> suade- <sup>a</sup> *epist. 6. lib.*  
 bat Planco, ne pacem componeret inter <sup>10.</sup>  
 D. Brutum & Antonium, vocans Anto-  
 nianos, foedissimos latrones: qui aut ar-  
 mis positis pacem petere debent: aut si  
 pugnantes eam postulant; victoria pax,  
 non pacione parieda est. & idem dicit <sup>b</sup>, <sup>b</sup> *Philipp. 3.*  
 ignorare iura belli, & exempla maiorū:  
 & quid populi Romani maiestas, quid  
 senatus seueritas postularet, qui legatos  
 ad Antonium mittendos censerent. non  
 enim verbis rogandum, sed armis cogē-  
 dum esse. & idem vocat hoc bellum in-  
 expiabile, negans ideo paci locum esse <sup>c</sup>. <sup>c</sup> *Philipp. 13.*  
 Itaque bello sociali, cum socij populi Ro-  
 mani sperantes, se non fore amplius sub-  
 ditos, sed imperij participes, bellum pa-  
 rarent, & legatos Romā mitterent que-  
 stum, se nō admitti ad ius ciuitatis, cum  
 tamen ipsorum opera, & auxilio, longē  
 lateque imperium extēdissent Romani:  
 ad hęc senatus seuerè respōdit, se, donec  
 resipuissent, non audituros legationes  
 eorum <sup>d</sup>. Hinc quoque cum Tacfarinas <sup>d</sup> *Appian. de*  
 nobilis latro, eō arrogantiae venisset, vt <sup>d</sup> *bel. ciuil. lib. 2*  
 legatos ad Tiberium mitteret, sedēque  
 vltro sibi atque exercitui suo postularet,

DE IVRE ET OFF. BELL.

aut bellū inexpiabile minitaretur. Non  
 a *Annal. lib. 3* alias magis, inquit Tacitus<sup>a</sup>, sua, populi  
 que contumelia, Rom. indoluisse Cæsa-  
 rem ferunt, quàm quòd desertor, & præ-  
 do, hostium more ageret. ne Spartaco  
 quidem, post cōsularium exercituū cla-  
 des, multum Italiam vrenti, quanquam  
 Sertorij & Mithridatis ingētib. bellis  
 labaret resp. datum, vt pacto in fidē ac-  
 ciperetur: nedum pulcherrimo populi  
 Romani flagitio, latro Tacfarinas, pace  
 & concessione redimeretur. hæc ille. iis  
 tamen, qui se, citra pactionem, fidei im-  
 peratorum dederent, parci solet. itaque  
 Fabius Max. Æmilianus, Conobæ latro-  
 num duci, qui se ei dedit, pepercit<sup>b</sup>. &  
 b *Appian. de bell. Hisp.* Augustus Crocolæ, insigni latroni in  
 Hispania, cū magno in eius caput  
 proposito præmio, sese sponte offerret,  
 veniam dedit, & præmium exigenti, nu-  
 merari iussit. ne scilicet, si eum supplicio  
 affecisset, videretur voluisse frustrari  
 promisso præmio, vel decepisse fiducia  
 c *Dion. l. 36.* juris publici<sup>c</sup>. Porrò non solùm si cum  
 rebellibus, vel latronibus\*, & iis qui ho- 13  
 stium numero non sunt definiti, res sit;  
 sed & si cū hostibus, & iis qui iusto bello  
 nobiscum contendunt agatur, non sem-  
 per si-

per fidem seruare cōuenit : & inprimis,  
 si quis iurauerit, humana forte infirmi-  
 14 tate\* lapsus, se facturum id, quod Deum,  
 per quem iurauit, possit offendere, non  
 faciet, quod iurauit. nam iuramentum  
 non debet esse vinculum iniquitatis <sup>a</sup>: a c. inter co-  
 tera. 22. q. 4.  
 & in malis promissis fidem seruari non  
 expedit <sup>b</sup>, neque obligatur quisquam ex b c in malis.  
 de reg. iur.  
 iuramento contra bonos mores præsti-  
 to <sup>c</sup>, sed & qui rem illicitam facit, quia c c. nō est ob-  
 ligatorum. de  
 reg. iur.  
 iurauit, accumulatur peccata peccatis <sup>d</sup>. Est  
 itaque contra officium nonnunquam, vt  
 inquit D. Ambrosius <sup>e</sup>, fidem seruare.  
 quod & Cicero sensit <sup>f</sup>, & Seneca in  
 Hercule Oetæo, cū ait: d c. duo ma-  
 la. 13. c. mu-  
 lier. 22. q. 4.  
 e off. lib. 1.  
 f offic. lib. 3.

*Præstare fateor posse me tacitam fidem,*

*Si scelere careat: interim scelus est fides.*

Nam, vt inquit D. Augustinus, si ad pec-  
 catum admittendum fides exhibeatur,  
 mirū est, si fides appellatur <sup>g</sup>. vnde longè g c. si ad pec-  
 catū. 22. q. 4.  
 iustius fecit Dauid, quod non stetit iu-  
 ramento, de perdendo Nabal, quàm He-  
 rodes, qui propter iusiurandum, occidit  
 virum sanctissimum <sup>h</sup>. Meritò quoque h c. est etiā.  
 ca quod Da-  
 u d. c. iurauit.  
 22 q. 4.  
 Cicero <sup>i</sup> Agamemnonis factum repre-  
 hēdit: qui cū deuouisset Dianæ, quod  
 in suo regno pulcherrimum natum es-  
 set, Iphigeniam immolauit. promissum i offic. lib. 3.

DE IVRE ET OFF. BELL.

a *Authent. de iur. C. de nept. facti l. repræbenda. C. de institut. & substitut.*  
 b *Gloss. in c. si aliquid. 22. q. 4. Frim. v. c. si vero. de iureiur. Rolid. a Val. con. 98 no. 18 Alc. ad l. pacta que contra. C. de pact. nu. 32.*  
 c *l. iurisdictionum. §. si per e. §. generaliter. l. ius publicum. D. de pact. l. vlt. D. de his qui satis. cogant. Gloss. et ad. in l. conventionum. D. de pactis in c. licet mulier. de iureiur. in 6. Bart. in l. vlt. c. quando lic. sino iud. Alc. li. de sing. cer. §. 44. tex. c. si cut nostris. de iureiur. in c. 1. de iureiur. in 6. reg. Hisp. l. vlt. ti. 28. p. 2*

enim, vt idem ait, potius non faciendum, quàm tam tetrum facinus admittendum fuit. qua ratione etiam facinus Gedeonis non probatur superiori simile, qui vt votum solueret, Iephte filiã immolauit. Illicitæ itaque rei iusiurandum seruari non debet, & pœna periurij, si qua est, in eum conuertenda est, qui exegit: id quæ verum est, etsi tantum agatur de peccato veniali<sup>b</sup>. His consequens est, quod fides data a priuato\*, in præiudicium reipub. 15  
 ve ecclesiæ, non sit seruanda c. quod verum est, si principaliter de eius præiudicio agatur<sup>d</sup>. quia propinqua causa inspicci debet non remota<sup>e</sup>. Itaque Themistocles in exiliũ missus, cum ad Xerxem se contulisset, ei quæ promisisset se Atheniensibus bellũ illaturum, & a rege moneretur vt promissa seruaret: quamuis graui iniuria affectus a ciuibus, & humanissimè exceptus a rege: tamè honestius sibi vitæ finem imponere ratus, quàm patriæ bellum inferre, epoto veneno, mortẽ sibi consciuit<sup>f</sup>, sunt quæ præclara in hanc rem C. Claudij verba, dum hortatur App. Claudium, & reliquos decem viros,

d *l. iurisdictionum. & ibi DD. de pact. c. quamuis. de pact. in 6. e l. si mulier. D. de reb. amot. f Plat. in Themisto.*

uiros, vt tyrannidem deponerent: non debere eos mouere, inquiēs, si quas fortè pactiones arcanas inter se fecissent, fidē- que dedissent, sponsores facientes deos: docens has conuentiones seruatas impias esse, vt aduersum ciues & patriam; solutas verò, pias fore. quòd dij nō gaudent, se adhiberi ad rem turpem & iniustam<sup>a</sup>. Qua de causa etiam Vlpianus respondit, maleficij & rerum inhonestarū nullam societatem esse<sup>b</sup>. Itaque non seruare fidem quandoque iustū esse docet Cicero<sup>c</sup>. veluti non reddere depositum furioso, vel hosti patriæ. omnia enim quæ agimus, referri debent ad fundamenta iustitiæ: primum, vt ne cui noceatur: deinde, vt communi vtilitati seruiatur, vnde etiam iurisiurādi temeritatem reprehendunt poëtæ in Phaëtonis fabula, & satius fuisse docent, iurisiurādum violasse, quàm iuueni imperito solis habenas, totius mundi malo, permisisse<sup>d</sup>. & huc facit, quod Paulus ait, si pactum conuentum a re priuata remotū sit, non esse seruandum<sup>e</sup>: & Vlpianus<sup>f</sup>, quòd generaliter, quoties pactum a iure communi remotum est, seruari non debet, etiam iuratum. nam maior est auctoritas

<sup>a</sup> Dion. Hal. ant. Roma. lib. 11.

<sup>b</sup> in l. quod autem. l. nec prætermittendis. D. pro soc. c. off. lib. 1a

<sup>d</sup> Ouidius metam. 2.

<sup>e</sup> in l. si vnus §. pacta. D. de p. et.

<sup>f</sup> in l. iurisiurētum. §. generaliter. D. de pact.

DE IVRE ET OFF. BELL.

iuris, quàm iuramenti. itaque iusiurandum contra vim legum, & auctoritatem

a *l. si quis inquisitos. §. ult. D. de legat. 1. l. adigere. §. ult. D. de iure patris. l. non dubium. C. de legibus.*

iuris, nullius est momenti<sup>a</sup>. & hinc est, quod in quolibet iuramento, censetur excepta superioris auctoritas, quoad ea quæ ad superioris potestatem spectant; cui per iusiurandum derogari non potest<sup>b</sup>, nō enim potest quis pacisci de iis,

b *c. constitutus, & ibi Felinus. de rescriptis. c. veniens. de sumptibus.*

quæ non sunt sui arbitrij. qua ratione Gonsalvus, prorex Neapoli, comitem Valentinum, quem in suam fidem acceperat, postea, ex mandato regis Ferdinandi, sine vlla perfidiæ nota, in carcerem

c *Bodinus de rep. lib. 1. c. 8.*

coniecit<sup>c</sup>. hinc quoque ei, qui iuravit, se ordini non interfuturum, gratiam se iusiurandi facere, imperatores Seuerus

d *in l. ult. D. de administr.*

& Antonius rescripserunt<sup>d</sup>, imo si iusiurandum sit contra remp. ipso iure remissum censetur: ex eo quòd Paulus ait, lege Iulia remitti iusiurandum, de non

e *in l. adigere. §. v. s. D. de iur. patro.*

contrahendis nuptiis<sup>e</sup>. fuit enim apud Romanos conditio, vel promissio, de non contrahendis nuptiis tam odiosa,

f *l. 2. C. de iud. vid. tol. l. sed et si hoc. §. ult. cum l. sequ. l. mulieri & Titio. D. de eod. et demōs.*

vt a testamētis, aliisque actibus omnino remoueretur, & pro non adiecta haberetur<sup>f</sup>. Licebit itaque priuata fide contempta, publicæ securitatis curâ gerere.

apud sapientes enim, inquit Cornelius Tacitus

Taci-

Tacitus, cassa habentur, quæ neque dari, neque accipi salua rep. possunt. in quam sententiam exstant egregia verba Postumij, quibus ostendit populum Roma. non teneri sponfione, quam cum Samnitibus fecerat, contranitentibus L. Liuiο, & Q. Melio Trib. pleb. qui & ipsi auctores pacis Caudinæ fuerant: &, ne hostibus dedrentur, persuadere conabantur, populum Rom. religione astringi esse<sup>a</sup>. Ceterum longè tutius<sup>\*</sup>, &

16 laudabilius erit, vt quis non permittat se vllius periculi metu ad fidem dādā de re illicita impelli, quàm datam fallere. nam iurans se facturum rem illicitā, ipso facto est periurus<sup>b</sup>: & quoduis malum potius tolerandum est, quàm malo consentiendum<sup>c</sup>. quo nomine constantiam Pōrij Cæsariani militis, meritò laudes: qui pro Cæsaris partibus excubās, a Scipionis præsidio interceptus, cū vno modo saluse ei daretur, si se futurū, Cn. Pōpei militē affirmasset: ita respōdere nō dubitauit; Tibi quidē, Scipio, gratias ago: sed mihi vti ista cōditione vitæ, nō est opus. Pari fiducia C. Meuius cēturio Augusti, cū Antoniano bello se penūerō excellētes pugnas edidisset, in prouisis hostiū in

<sup>a</sup> *Linus l. 9.*

<sup>b</sup> *c. sicut no-*  
*stru. de iure-*  
*iur. g. off. in c.*  
*1. de iur. iur.*  
*in 6.*  
*c. c. ita nr. 23.*  
*quest. 5.*

DE IVRE ET OFF. BELL.

fidijs circumuentus, & ad Antonium Alexandriam perductus, interrogatusque quidnam de eo statui deberet: Iube me, inquit, iugulari: quia nec salutis beneficio, nec mortis supplicio adduci possum, vt Cæsaris miles esse definā; & tuus esse incipiam. sed quo constātius vitam contempsit, eò facilius impetrauit. Antonius enim virtuti eius incolumitatē concessit<sup>a</sup>. &, ne singulos referam, vniuersa Saguntus, Hispaniæ ciuitas opulēta, magnum, licet triste, fidei erga Romanos monumentum: cū post continuam obsidionem, se diutius ab Annibale tueri non posset, neque Romani ope ferrent, spretis conditionibus pacis minus honestis, se suaque omnia in rogam coniecit potius, quā a Romanis, cum quibus foedus inierat, deficeret<sup>b</sup>. Denique hosti fidem fallenti<sup>\*</sup>, fides seruanda non est, etiam iurata<sup>c</sup>: & tam publicæ conuentionis, quā priuatæ<sup>d</sup>: secundum illud:

*Fallere fallentem, fr audemq, repellere fraude,  
Exemploq, licet ludere quemq, suo.*

Generalis enim lex est, omniū conuentionum, vt nemo illis stare teneatur, nisi ex aduerso, quæ conuenerunt, præstentur.

<sup>a</sup> Val. Max. lib. 3. cap. 8.  
<sup>b</sup> Livius lib. 21. Val. Max. lib. 6. cap. 6. L. Florus, lib. 2. cap. 6.  
<sup>c</sup> c. peruenit. 2. c. sicut & infra. de iure iur. l. qui fidei. D. de trans. l. Iulianus. §. offerri. D. de act. impet. l. si instituta. D. de inoff. testa. l. cum proponas. 2. C. de pact. l. cum proponas. l. si diuersa. C. de trans. d. per text. e. leg. in c. sicut & infra. §. vlt. de iure iur. gloss. in l. qui fidei. D. de pact.

tur<sup>a</sup>, nam frustra quis fidem ab eo præ-  
 stari postulat, cui fidem datam seruare  
 recusat<sup>b</sup>. atque dolo facit, qui id iuris in  
 aduersarium valere postulat, quod in se  
 non admittit: contra quem edicto præ-  
 toris cautum est, vt quod quisque iuris  
 in alium statuit, ipse eo vtatur. neque di-  
 cendus est quis ex hac causa fidē violare:  
 sed potius ex noua, eademque iustissima  
 causa, nempe ruptæ fidei, iure belli agere  
 cum hostibus, diuini, humanique iuris  
 contemptoribus. qua de causa Romani,  
 cum Sabinis, Latinis, Priuernatibus,  
 Volscis, Hernicis, Apulis, Samnitibus,  
 Hetruscis, Æquis, Carthaginiensibus, a-  
 liisque quamplurimis, ruptis foederibus  
 bella gessere: & senatus prædam Epiri  
 ciuitatum, quæ rupto foedere ad Persea  
 defecerant, muris earū dirutis, exercitui  
 dedit. iuramentum enim non extendi-  
 tur ad ea, quæ postea accidunt: & noua  
 causa superueniente, potest quis nō im-  
 plere, quod iurauit<sup>d</sup>. Quò spectat, quod  
 Cicero<sup>e</sup> docet: Tempore nonnūquam  
 commutari officium; ita vt non seruare  
 fidem, quandoquē iustum sit: veluti non  
 reddere gladium depositum furioso, vel  
 hosti patriæ. & in omni quoque iura-  
 mento

a d. l. cibus  
 proponas. 2.  
 C. de pact.  
 b c. frustra,  
 dereg. ur. l.  
 cum patet. §.  
 liberu. D. de  
 leg. 2.

c Lincius lib.  
 35.  
 d cap. ad vo-  
 stram. 2 cap.  
 quemadmo-  
 dū. c. clericus.  
 de iureiur. c.  
 cum iur. P.  
 de re. l. 5.  
 §. sed viden-  
 dum est. D. de  
 success. edict.  
 l. cum Aquil-  
 liana. l. quo cū  
 tutoribus. D.  
 de trans. l. tres  
 fratres. D. de  
 pact. l. si de  
 certa. C. de  
 trans.  
 e offic. lib. 1.

DE IVRE ET OFF. BELL.

mento intelligitur hæc conditio, si mihi  
 servata fides fuerit<sup>a</sup>: vel nisi per aduersa-  
 rium steterit, quo minus pacta seruen-  
 tur<sup>b</sup>. nam cum hoc fit, censetur interue-  
 nire tacita pacti remissio<sup>c</sup>: & is qui prior  
 contrauenit, solus fidem fregisse cense-  
 tur<sup>d</sup>: ita ut sequentis factum ad violatio-  
 nem referri nequeat<sup>e</sup>. Quò spectat con-  
 tentio illa Romuli cum Cluilio Alba-  
 norum dictatore, vter scilicet prior cõ-  
 ditionibus foederis non stetisset; eum e-  
 nim solum foederis violati reum esse<sup>f</sup>.  
 vnde priorem quoque belli causam ma-  
 nere dicendum est. nam si in eo fides vio-  
 letur, cuius contemplatione contractus  
 initus est, corrumpitur conuentio, & omnia  
 in pristinum statum redeunt<sup>g</sup>. Itaque Vl-  
 pianus ait, non teneri actione pro socio,  
 qui ideo societati renunciauit, quia con-  
 ditio quædam, qua societas erat coita, ei  
 non præstatur<sup>h</sup>. & idem integram dicit  
 manere inofficiosi testamenti causam, si  
 fides ab herede transactioni non præsta-  
 tur<sup>i</sup>. reciprocatio enim obligationis, v-  
 trinque vinculum iniicit, & ita quidem,  
 ut alter ex sua parte non teneatur, si ex  
 aduerso, illi quod conuenit, non præsta-  
 tur. idque verum est, siue conuentioni  
 poena

*a* c. peruenit.  
*z* c. quemad-  
 modum. c. sicut  
 & infra. §.  
 ult. de iurciu-  
 van. l. quero.  
 §. inter. D.  
 loca.  
*b* l. cum pro-  
 ponat. C. de  
 non ser.  
*c* c. constitu-  
 tus. de pen.  
 d. l. aut facta.  
 §. 1. & ibi  
 Bar. de pen.  
 §. l. uam et si  
 sub cõditione.  
 D. de iniust.  
 rup. irris. fac.  
 testa. l. cum  
 pater. §. li-  
 bertus. D. de  
 leg. 2.  
*f* Dion. Hal.  
 ant. Ro. lib. 3.  
*g* l. cum te. C.  
 de pact. inter  
 emp. & ved.  
 l. cum prope-  
 nas. C. de pac.  
 l. & eleganter.  
 D. de dolo.  
*h* l. si conue-  
 nerit. D. pro  
 socio.  
*i* in l. si insti-  
 tuta. in princ.  
 D. de inoff.  
 testa.

poena sit adiecta, siue non: neque poena debetur: & etiam si necessaria causa impeditus aduersarius, fidem non seruet<sup>b</sup>, quamuis enim impedimentum a mora seu poena excuset<sup>c</sup>: ad producendam tamen actionem satis momenti non habet<sup>d</sup>. idem erit, si vel in minima re fidem seruare neglexerit<sup>e</sup>. nisi tamen tam leuis momenti res sit, vt non sit verisimile, eius vtrinque magnam rationem habitam fuisse. In tantum quoque ex parte sua, quifque ad fidei datae obseruationem tenetur, vt etiam si ipsa promissionis causa cessaret, nihilominus duret haec obligatio<sup>g</sup>. Quod si non constet, vter prior fidem datam violauerit, mutua compensatione vterque a poena contractus absoluendus est<sup>h</sup>. solet enim dici, inter paria delicta compensationi locum esse<sup>i</sup>. vnde receptum est, licere litigatori malitiam aduersarij sui, malitia repellere<sup>k</sup>: & cornicum oculos, quod aiunt, configere. quod intelligendum est, dum tamen bonam causam habeat<sup>l</sup>, & fraude non vtatur, quae in criminis notam trahat: quale est falsum stellionatus, & id genus simile<sup>m</sup>. Et haec quidem plerisque probantur in pacto pacis vel foederis, non etiam indutia-

a d. l. quarta.  
 §. inter. D. licet.  
 b Alciat. ad l. cum proponas. nr. 13.  
 C. de pass.  
 c l. si vberda. §. idem iuris. D. ad l. Rhodiam.  
 d l. si vno. §. item cum quida. D. locati.  
 e Alexad. ad l. penult. C. de his quibus vbi indig. Corr. cōcil. 246. lib. 3. Alc. concil. 167. Bald. ad l. postea conuents. D. de constr. compt. Tiraq. lib. de iud. in reb. exig. ferend. f l. 1. §. proinde. D. de edil. ediff.  
 g l. vlt. §. vlt. D. de rescind. vend.  
 h c. constitutus. de pen.  
 i l. viro. D. solut. matris.  
 k gloss. in c. cupientes, vers. malignantiu. de elect. in 6.  
 l c. Dominus. 23. q. 23.

rum, in But. in c.

3. derog. iur. Alciat. in l. cum proponas. C. de transact.

a Vinc. Ioan.  
Andr. Ant. de  
Butr. Card.  
Angel. Cast.  
Felin. las. Al.  
cias. Laud. &  
duo Socyns,  
quas allegat  
P. trin. B. l. de  
re malis. par. 5  
et. 3. et Myn-  
fin. cent. 4.  
obser. 7. &  
Dec. 3. concil.  
21.  
b l. poss. hmi-  
nū. §. indu-  
tie. D. de ca-  
ptiv. Gell. lib.  
1. cap. 25.  
c l. obligatio-  
num ferē. §.  
placet. D. de  
act. & oblig.  
l. qui Romē.  
§. Callima-  
chus. D. de  
verbor. oblig.  
d c. nonis. de  
iud. c. ille no-  
uit. c. vlc. de  
vres. & pact.  
e l. dolam. C.  
de per. et com.  
rei vend. l. nō  
fraudentur. §.  
nemo. D. de  
regul. iur. l. 3.  
§. 1. D. de do-  
nac. inter vir.  
& uxor.  
f. in l. quaro.  
§. inter. D. la-  
cili.

## DE IVRE ET OFF. BELL.

rum\*, quas inuiolabiliter seruādas esse, 18  
etiam hoste fidem earum fallente, cen-  
sent<sup>a</sup>. quorum sententiam vt saniozem,  
& æquiorē, amplexos fuisse cameræ im-  
perialis assessores, refert Mynsingerus,  
& addit rationem diuersitatis, qua etiā  
ceteri innituntur: quòd scilicet finito  
indutiarum tempore, quis se vlcisci pos-  
sit. quæ certè ratio neque satis idonea,  
præfertim in bello: (vbi, vt inquit Li-  
uius, si in occasionis momēto, cuius præ-  
teruolat oportunitas, cunctatus paululū  
fueris, nequicquam mox ommissum que-  
raris) neque etiam iure probata videtur.  
cū enim inter pacem & indutias, hoc  
tantū intersit, quòd illa perpetua sit,  
hæ verò ad tempus<sup>b</sup>: & tempus obliga-  
tionem neque augeat, neque minuat<sup>c</sup>:  
quemadmodum pax alterutro fidē fal-  
lente corrui; ita & indutias dissolui cō-  
sequens videtur: cū vtroque eadem  
subsistat ratio: nempe ruptę fidei<sup>d</sup>; & nemo  
ex suo dolo, vel delicto lucrari, aut aliis  
nocere debeat<sup>e</sup>. est que in hanc rem, nisi  
fallor, elegans responsum Pauli f: qui,  
cū proponeretur inter locatorē fundi  
& conductorē conuenisse, ne intra tem-  
pora locationis conductor expelleretur,  
adicte

adiecta pœna; nihilominus tamen, si cō-  
 ductor biennij continui pensionem nō  
 solueret, sine metu pœnæ cum expelli  
 posse respondit, etiam si nihil de solutio-  
 ne pensionum in stipulatione pœnali  
 expressum esset. quibus certè argumētis  
 moueor, vt potius inclinem in sententiā  
 eorum, qui existimauerunt idem iuris  
 esse in iudiciis, quod in pace vel fœde-  
 19 re<sup>a</sup>. præsertim cū indutiæ<sup>\*</sup> etiam longi  
 temporis esse possint<sup>b</sup>. legimus enim  
 Veientibus a Romulo in centum, & a  
 Seruio Tullio in xl. & in totidem annos  
 L. Furio, & C. Manlio consull. indutias  
 datas fuisse<sup>c</sup>. & cum populo Cæriti, in  
 cētum annos indutias factas fuisse pro-  
 ditū est<sup>d</sup>. Volsiniensibus verò bello fef-  
 sis, in viginti annos indutiæ datæ sunt<sup>e</sup>.  
 Tarquinienfes, metu compulsi, a Decio  
 cons. in xl. annos indutias petiere<sup>f</sup>. Æ-  
 qui octo annorum indutias impetraue-  
 runt<sup>g</sup>. Hetruurię capita, Volsinij, Perusia,  
 & Aretium, cū pacem peterent, indu-  
 tias in xl. annos obtinuerunt<sup>h</sup>. vnde le-  
 gimus quoque violationē indutiarum  
 æquē vt fœderis, Romanis, qui iura belli  
 religiosissimè semper conseruarūt, cau-  
 sam belli fuisse. atque ita cum Samniti-  
 bus,

<sup>a</sup> Pan. Imo.

Alex. Decim.

Alciat. Bell.

Cor. quos ci-

tas Mysia-

gerus. cens. 4.

obser. 7. Petr.

Bell. de re mi-

lit. par. 5. tit.

3.

<sup>b</sup> Bell. lib. 1.

cap. 25.

<sup>c</sup> Livius li. 1.

cap. 2.

<sup>d</sup> Livius l. 7.

<sup>e</sup> Livius l. 5.

<sup>f</sup> Livius l. 9.

<sup>g</sup> Livius l. 4.

<sup>h</sup> Livius l. 11.

DE IVRE ET OFF. BELL.

bus, quibus biennij indutiæ datæ fuere, 18  
 eodem anno ruptis indutiis, bellatum  
 a *Liuius l. 9.* est<sup>a</sup>. & contra Hetruscos, qui pacem fœ-  
 dusque a Romanis petentes, indutias in  
 triginta annos impetrauerāt, paulo post  
 indutiarum fide violata rebellantes, fe-  
 liciter res gesta est: & eodē anno, inquit  
 b *lib. 9.* Liuius<sup>b</sup>, cum reliquis Hetruscorum ad  
 Perusiam, quæ & ipsa indutiarum fidem  
 ruperat, Fabius cons. nec dubia, nec dif-  
 ficili victoria dimicauit, & ipsum oppi-  
 dum (nam ad moenia victor accessit) ce-  
 pisset, ni legati dedētes urbem exissent.  
 c *lib. 11.* & idem Liuius alio loco<sup>c</sup> refert, Hetruf-  
 cis (quòd cum pax negata, & indutiæ  
 biennij datæ essent, ac aduersus indutias  
 pararent bellum) a Romanis bellum il-  
 larum fuisse. his accedit, quòd maior so-  
 let esse religio fœderis, vbi precatione  
 res transigebatur, quàm indutiarum, al-  
 teriúsue sponfionis: ideoque iniussu po-  
 puli, nec sine fecialibus, cærimoniaque  
 d *Liuius l. 9.* alia solemnni fœdus fieri non poterat<sup>d</sup>.  
 indutias verò, aliasque sponfiones, sine  
 fecialibus, aliisque solemnitatibus. sæpe  
 a belli ducibus, iniussu populi factas  
 fuisse legimus: vt proximo capite latius  
 ostendimus. atqui nihil quicquam fa-  
 crosan.

crofanctum esse potuit, inquit Cicero,  
 nisi quod plebs populúsque sanxisset, &  
 quod aut genere ipso, aut obtestatione  
 legis, aut poenæ, cum caput eius, qui cō-  
 trā facit consecratur, sacratum esset <sup>a</sup>. a in orat. pro  
l. Corn. Bal.  
 cum itaque foedus, quod sanctius est,  
 altero fallente rumpatur, multò magis  
 indutiæ. Non tamen improbandi sunt ij,  
 qui indutiarum tempore, quãuis iniuria  
 prouocati, ab omni vindicta abstinent;  
 maximè si de leui, & exigui téporis præ-  
 iudicio agatur, vt omne violatæ fidei de-  
 decus, sit penes hostem: sed id vsu & cō-  
 suetudine potius receptum, quàm iure  
 probatum asserit Alexand <sup>b</sup>. cui conue- b ad l. cum  
proponas. C.  
de pact.  
 nire videtur, quod Scipio (quamuis non  
 modò indutiarū fides rupta esset a Car-  
 thaginiensibus, sed etiam ius gentiū in  
 legatis suis violatum) tamē se nihil, nec  
 institutis populi Romani, nec suis mo-  
 ribus indignum facturum dicens: lega-  
 tos hostium, qui eodem tempore Roma  
 ad eum venerant, inuiolatos dimisit <sup>c</sup>. c Linius l. 30  
 quo nomine Scipio maximam laudem  
 meruit: licet, si verè iudicare volumus,  
 nullo non iure legatis Carthaginiensiu  
 parcere debuit, vt maximè duplici scele-  
 re, vt refert Linius, omnino ruptę essent  
 K indutiæ.

DE IVRE ET OFF. BELL.

indutiæ . ea enim de causâ Scipioni ad bellum redire, quod fecit, sine vlla perfidiæ nota licuit : non autem hostium legatos lædere , qui citra vllam pacis , vel indutiarum cõventionem, etiam in ipso ardore belli sunt inuiolabiles , & sancti iure gētium<sup>a</sup>. neque refert, quod hostes prius indutias fregerint , & legatos hostium violauerint . nam , quod diximus fidem frangenti<sup>\*</sup> non esse fidem seruandam , ad vnam, eandemque conuentionem referendū est, cuius fides rupta est : & ad ea quæ vna , eademque sponsione comprehensa sunt<sup>b</sup> : & in promissionibus , quarum altera alterius causa facta est<sup>c</sup>. connexorum enim vnum idemque est iudiciū<sup>d</sup>. secūs verò est in separatis<sup>e</sup>. vnde si quis in vnam legē committit, alterius legis beneficio non exuitur : & heres in primis tabulis institutus , & in secundis substitutus : potest repudiata hereditate ex primis tabulis, adire ex secundis hereditatem<sup>f</sup>. Quare in bello<sup>\*</sup>,<sup>21</sup> etiam si cum perfido & fœdifrago hoste res sit, & qui semel, iterum, & sæpius fidē fefellit , vicissim fidem fallere non licet : nisi per hostem stet , quo minus cõuentorum fides seruetur : vt superius ostendimus :

a l. vlt. D. de legationib.

b Alexander ad l. cum proponas. C. de pact. l. si duo, et ibi Accurt. D. de dolo.

c Alciat. ad l. cum proponas. nu. 31.

d è. tràslato, de constitut.

e l. cum fundum. D. de vi

et vi armat. Fl. filius. D.

de vulg. et pupil.

dimus: alioqui verò perfidiam perfidia  
 vlcisci semper turpissimum fuit. quo no-  
 mine Lucullus malè audiuit, qui Lusit-  
 tanos, ruptis foederibus bella gerentes,  
 contra iurisiurandi fidem, dolo circum-  
 uentos, per summã immanitatem om-  
 nes trucidauit; barbaros imitatus, nul-  
 la Romanæ dignitatis ratione habita<sup>a</sup>.  
 & Ser. Galba a Libone trib. pleb. pro  
 rostris accusatus fuit, quòd Lusitanorũ  
 magnam manum ruptis pactis rebellã-  
 tium, interposita fide, prætor in Hispani-  
 22 a interemisset<sup>b</sup>. Denique pactum<sup>c</sup>  
 quoque foederis, pacis, vel indutiarum,  
 dolo malo initum, nullius erit momẽti.  
 pacta enim conuenta dolo malo irrita,  
 non tuetur prætor<sup>d</sup>: & dolus dans cau-  
 sam contractui bonæ fidei, facit contra-  
 ctum ipso iure nullum<sup>e</sup>. quod ita verum  
 est, vt tamẽ in arbitrio eius permitratur,  
 qui deceptus est, velit nec ne pactis stari:  
 alter verò qui dolum admisit, audiendus  
 nõ est<sup>f</sup>. nemo enim ex dolo suo lucrari,  
 aut aliis nocere debet<sup>g</sup>: & propter malã  
 fidem alterius contrahentium, potest  
 cõtractus pendere ex arbitrio alterius<sup>g</sup>.  
 Legimus tamen in sacris litteris, quòd  
 Iosue, licet dolo circũuentus a Gabao-  
 nitis,

<sup>a</sup> Appian. de  
bell. Hisp.

<sup>b</sup> Val. Max.  
lib. 8. c. 1.

<sup>c</sup> l. iurisgen-  
tium. §. prætor.

<sup>d</sup> §. dolo malo.  
D. de pactis.

<sup>e</sup> l. elegã-  
ter. D. de dolo.

<sup>f</sup> l. in cause. 2.  
§. 1. D. de mi-  
nor.

<sup>g</sup> l. trãfactio-  
ne C. de trãf-  
act. l. 2. D. ad  
S. C. Vell.

<sup>h</sup> l. dolum. C.  
de per. et com-  
ra vend. l. si  
creditoribus.

<sup>i</sup> C. de fern. pi-  
gno. da. man-  
g l. qui offi-  
cy. l. donũ. D.  
de cond. empt.

<sup>j</sup> l. Iulianus. §.  
per contrarium.

<sup>k</sup> D. de actio-  
empt. l. credi-  
tor. §. Lucius

<sup>l</sup> D. mandat.

DE IVRE ET OFF. BELL.

nitis, & deprehensa eorum fraude (quòd cùm finitimi essent, & e terra, quæ a Domino Israëlitis promissa erat, aduenas se, & è longinqua terra esse, commentiti essent, vt pacem ab Israëlitis impetrarent) tamen pacem, quam dederat, reuocandã non esse censuit: ne dum alienam perfidiam redargueret, suam solueret<sup>a</sup>. sed, vt inquit D. Ambros.<sup>b</sup> Veterẽ ibi de dolo, non iurisperitorum formulam, sed patriarcharum sententiã, scriptura diuina expressit: quæ non ad politicam necessitatem, sed ad plenitudinem perfectionis Christianæ pertinet. sed & Iosue quoq; quamuis Gabaonitas liberaret de manu filiorũ Israël, ne occiderentur; maledixit tamen eis, propter fraudẽ ipsorum, decreuitque vt inferuissent cuncti populo<sup>c</sup>.

<sup>a</sup> Iosue c. 9.  
<sup>c</sup> innocẽs. 23.  
 que 7. 4.  
<sup>b</sup> offic. lib. 3.

<sup>c</sup> Iosue cap. 9

DE FOEDERIBVS ET IN-  
 DVTIIS.

- 1 Tria fœderum genera.
- 2 Maiestatem comiter conseruare, in fœderibus addi solitũ, quam vim habeat.
- 3 Romani nunquam cum hoste armato fœdus facere soliti.
- 4 Quid inter fœdus & spõsionem intersit.
- 5 Dux belli pacem cum hoste, iniussu principis facere non potest.

- 6 *Andux belli, sicut pacem, & inducias facere prohibeatur.*
- 7 *Princeps verum utilitatis publicæ causa potest priuatis quid detrabere.*
- 8 *Princeps astrictus legibus naturæ.*
- 9 *Reges quatenus sint domini omnium.*
- 10 *An princeps teneatur ex fœdere iuncto cum principe, cui successit.*

## CAPVT SEPTIMVM.

**Q**UOD ad fœdera, quibus hosti fidem obstringimus, attinet, sciendum est tria\* fuisse olim fœderũ genera, quibus integrè paciscerentur amicitias ciuitates, regesque: vt disertè Menippus Antiochi legatus, Romam de pace missus, T. Quintio cõs. disseruit. a Liviu l. 44 vnum, cum bello victis dicerentur leges. vbi enim omnia ei, qui armis plus posset, dedita essent; quæ ex iis habere victor, quibus multari eos vellet, ipsius ius atque arbitriũ erat. & tale fœdus fuit, quod Æneæ, deserta Troia, pacem deprecanti, ab Achæis, qui eum insequabantur, datum fuit: his cõditionibus, vt Æneas & socij, cum suis rebus quas in fuga exportaerant, intra certũ tempus agro Troiano excederent, castellis in potestatem Achæorum

DE IVRE ET OFF. BELL.

*a Dion. Hal. antiqu. Rom. lib. 1.*

chæorum traditis<sup>a</sup>: & quod Romani cū  
Æquis fecerunt, his legibus: Æquorum  
populi, saluis suis agris, Romanorū sub-  
diti sunt: Romanis nihil mittūto, præ-  
ter auxilia, quoties accita fuerint, eaque

*b Dion. Hal. antiqu. Rom. lib. 9.*

sumptu proprio<sup>b</sup>. Tale etiā foedus fuit,  
quod Apuli a Romanis impetrarunt.  
non enim æquo foedere, vt inquit Li-  
uius<sup>c</sup>: sed vt in ditione populi Romani

*c lib. 9.*

essent, conuenit. eiusdem quoque ge-  
neris est foedus, quo Philippus ex om-  
nibus Græcię ciuitatibus præfidia dedu-  
cere iussus est, naues & elephantas tra-  
dere, mille talentū populo Rom. dare,  
extra Macedonię fines bellum, iniussu

*d Licinius l. 43*

Senatus gerere prohibitus<sup>d</sup>. & quo An-  
tiochus, cūm omnis Asia cis Taurum  
montē Romanis cessit, naues ornamen-  
taque tradidit, duodecim millia talenta  
attica in duodecim annos pēssionibus æ-

*e Livius l. 48*

quis, Romanis dedit<sup>e</sup>. Alterum foederū  
genus fuit, cūm pares bello, æquo foede-  
re in pace atque amicitia venirēt, quale  
inter Romulum & Tatium Sabinorum  
regem ictum fuisse legimus. cūm enim  
iam tertio, æquo Marte, sed maxima v-  
trinque accepta clade, acie certassent, in-  
tercedentibus Romanorū vxoribus, Sa-  
bini

bini generis (propter quas bellū exortum erat,) foedere, quā praelio bello h-  
nem imponere potius habuerunt: con-  
uenitq; vt Romulus & Tatius pari po-  
testate honoreque in vrbe regnarent, &  
vt Sabinis ius ciuitatis Romanæ dare-  
tur<sup>a</sup>. Soler autem in hoc foedere de ca-  
ptiuis reddendis, vrbibus tradendis, &  
similibus æquis conditionibus trāsigi<sup>b</sup>,  
itaque inter Octauium Cæsarem, Anto-  
nium, & Pompeium conuenit, vt pace  
terra marique reddita, negotiatores li-  
berè commeari omni loco possent: Pō-  
peius ex omnibus Italiæ locis præsidia  
deduceret: seruos fugitiuos, nō amplius  
admitteret: Sardinia, Sicilia, Corsicaq;  
& ceteris, quas tunc habebat, infulis im-  
peraret, & præterea Peloponnesum ac-  
ciperet: Cæsar & Antonius reliqua pos-  
fiderent<sup>c</sup>. & huius generis quoque esse<sup>c</sup>  
videtur foedus, quo Ætolis pax data fuit  
a Romanis, his conditionibus: Impe-  
rium, maiestatemque P. R. gens Ætolo-  
rum conseruato, sine dolo malo: hostes  
eosdem habeto, quos P. R. armaque in  
eos fertō, bellūque pariter gerito<sup>d</sup>.  
quamuis enim æquum foedus istud dici  
non potest, tamen verum est, non tan-

<sup>a</sup> Dion. Hal.  
ant. Rom. l. 2.

<sup>b</sup> l. in bello. in  
prim. l. si cap-  
tiuus. De de  
captiu.

<sup>c</sup> Appian. de  
bell. civil. l. 5.

<sup>d</sup> Liuius l. 48

DE IVRE ET OFF. BELL.

quam victis leges dictas, neque quicqua  
 ademptum, sed suis legibus liberos reli-  
 ctos <sup>a</sup>. Tertium porrò foederum genus  
 fuit, cùm qui hostes nunquam fuerât, ad  
 amicitiam sociali foedere inter se iungē-  
 dam coibant : ij neque dicere, neque ac-  
 cipere leges solent : (id enim victoris &  
 victi erat;) sed certis cōditionibus vtrin-  
 que amicitiam & societatem inibant :  
 quale fuit foedus, quod Latinus cum  
 Ænea fecit, Troianis in agri partem ad-  
 missis, pactus, vt essent illi in bello, quod  
 cum Rutilo parabant, socij: vt quē vtriq;  
 alteros pro viribus inuicem iuarent <sup>b</sup>.  
 & huc referri potest foedus, quo cum  
 Latinis, Postumio Cominio & Sp. Cas-  
 sio consl. instaurata est amicitia. quam-  
 uis enim constet eos antea fuisse subdi-  
 tos Rom. imperio, ex Dion. Hal <sup>c</sup>. tamē  
 propter fidelem operam, quā Romanis  
 nauauerant, postea sociali foedere iuncti  
 sunt, his verbis: Romanis & Latinorum  
 populis omnibus mutua pax esto, dum  
 cælum & terra stationem eandem obti-  
 nent : & neutri alteris bellum inferant,  
 aut aliunde hostes inducāt : nec bellum  
 inferentibus, iter tutū præbeant, & bello  
 infestatis, opē ferant totis viribus : præ-  
 damque

<sup>a</sup> l. nō dubito.  
 D. de captiu.

<sup>b</sup> Dion. Hal.  
 antiqu. Rom.  
 1 b. 1.

<sup>c</sup> lib. 3. & 4.

damque & spolia ex æquo diuidant. Sed  
 iidem Latini postea sæpius rebellantes,  
 tandem a Camillo perdomiti sunt, & in  
 potestatem populi Romani redacti. Hu-  
 ius verò fœderis genus dici quoque po-  
 test, cùm prouincia, vel ciuitas aliqua  
 tutelæ & protectioni alicuius principis  
 extranei se subijcit, aut regno vel rei-  
 publ. certis legibus accedit<sup>a</sup>. nã vt Pro-  
 culus respondit<sup>b</sup>, liber populus est: siue  
 æquo fœdere in amicitia venit, siue fœ-  
 dere comprehensum est, vt is populus al-  
 terius populi maiestatem<sup>\*</sup> comiter con-  
 seruaret. hoc enim adiicitur, vt intelli-  
 gatur alterum populum superiorẽ esse,  
 non vt intelligatur alterũ non esse libe-  
 rum. & ita quoque hanc clausulam; ma-  
 iestatem comiter conseruare, in fœderi-  
 bus adiici solitã interpretatur Cicero<sup>c</sup>.  
 & hoc quidem tertium fœderum genus  
 duplex dici potest. aut enim initur causa  
 defensionis tantũ; aut defensionis &  
 offensionis, vt dicunt: id est, tam ad ar-  
 cendum, quàm inferendum bellum. id-  
 quẽ vel contra quoscunque, vt fœderati  
 eosdem inimicos, amicosque habeant;  
 vel cum quorundam exceptione. His  
 addi possunt illa fœdera, quæ tantũ

<sup>a</sup> l. nō dubito.  
 DD. in l. si  
 conuenit. §.  
 si nulla. D. de  
 pig. act. Frac.  
 Rspa cōcl. 55  
 Socin. Nepes.  
 conser. 6. p. 1.  
<sup>b</sup> in d. l. non  
 dubito.

<sup>c</sup> in orat. pro  
 Cor. Balbo.

DE IVRE ET OFF. BELL.

commercij causa ineuntur, ut liberè mercatores vltro citroque commeari possint, quæ etiã cum hostibus esse possunt, fuit tamen Romanis constitutũ, ut nunquam cum hoste armato conditionem foederis acciperent: neq; cum aliquibus pacato imperio uti solent, nisi omnia diuina & humana tradidissent, & præsidium accepissent, aut denique societate aut foedere astricti essent. semper enim populus Romanus diligenter cauit, ne vi-

<sup>a</sup> Dion. Hal. lib. 2.

deretur hostium metu imperata facere a. itaque Sp. Cassius cons. legatis Hernicorum pacem petentibus respondit, prius illis facienda, quæ victos & subiugatos deceret, atque ita demum petendam a-

<sup>b</sup> Dion. Hal. ant. Ro. lib. 3.

micitiam <sup>b.</sup> & T. Larius cons. Fidenatibus indutias petentibus, respondit, deponenda esse arma, portasque aperendas, atque tum demum impetraturos colloquium: alioquin nec pacem, nec indutias, nec quicquam humanum, modera-

<sup>c</sup> Dion. Hal. antiq. Ro. l. 5.

tumque sperandum eis a populo Roma.<sup>c</sup> Sic quoque cum Pyrrhus, Albino cons. cum magna caede fugato, magnis copiis aucto suo exercitu, admirans virtutem Romanorum, quod nullam mentionem pacis faceret, prior, licet victor, pacem peteret

peteret æquissimis conditionibus, liberationem captiuorum, & auxilium ad subigendam Italiã populo Romano offerens: pro his nihil aliud, quàm Tarentinis securitatem, sibi amicitiam postulans: ex sentetia App. Claudij Cæci viri amplissimi, responsum est, vti Pyrrhus Italia excederet, tumque si e re sua videretur, de amicitia ac societate verba faceret: quoad verò in armis esset, populũ Romanum aduersus eum belligeraturum, etiam si mille Albinos pugna superasserat. Similiter Ætolis pacem petentibus, M. Fulvius conf. respondit, Ætolos, nisi inermes, de pace agentes non auditurum se: arma illis prius equosque omnes tradendos esse: deinde mille talentũm argenti P. R. dandũ <sup>b</sup>. Verminæ quoque Syphacis filij legatis, per quos petebat, vt rex sociusque, & amicus a senatu appellaretur, responsum est, pacem illi prius petendam a populo Rom. esse, quàm vt rex, sociusque, & amicus appellaretur <sup>c</sup>. Porrò non semper foedere, sed etiam per sponsonem nonnunquã hæ conventiones fieri solent. quid autẽ <sup>d</sup> inter hæc duo interfit\*, indicant hæc T. <sup>d</sup> Liuij verba <sup>d</sup>: Consules profecti ad Pontium

<sup>a</sup> Plut. in vita Pyrrh. Val. Max. lib. 8, c. 13. Cæc. de se. m. f.

<sup>b</sup> Liuij l. 49

<sup>c</sup> Liuij l. 51

<sup>d</sup> lib. 7,

DE IVRE ET OFF. BELL.

tium in colloquium, cùm de foedere vi-  
 ator agitaret, negarunt iniussu populi  
 foedus fieri posse, nec sine feacialibus, cæ-  
 rimoniamque alia solemni. itaque, non vt  
 vulgò creditur, Claudiusq; scribit, foë-  
 dere pax Caudina, sed per sponsionem  
 facta est. quid enim sponsoribus in foë-  
 dere opus esset, aut obsidibus: vbi preca-  
 tione res transigitur? per quem populū  
 fit, quo minus legibus dictis stetur, vt  
 eum ita Iupiter feriat, quemadmodum a  
 feacialibus porcus feriat. Spondere  
 consules, præfecti, legati, quæstores,  
 tribuni militum, nominaque omnium,  
 qui sponderunt, extant: vbi si foedere  
 res acta esset, præterquam duorum fe-  
 cialium non extarent: & propter neces-  
 sariam foederis dilationem, obsides etiã  
 DC. equites imperati, qui capite luerent,  
 si pactis non staretur. Ceterum sicut  
 summi principis est arma mouere, bellū  
 gerere, exercitum cogere, & delectum  
 habere<sup>a</sup>: sic e contrario foedera, & indu-  
 tias pacisci cum hoste, summi quoque  
 imperij est: vt superiore capite ostendi-  
 mus. itaque a ducibus belli\*, citra prin-  
 cipis, aut populi consensum, cuius no-  
 mine & auspiciis bellum geritur, pax  
 consti-

<sup>a</sup> l. 3. D. ad l.  
 l. vi. mas. dixi  
 supra de iusto  
 bello.

constitui non potest. quod olim iure fe-  
 ciali, & postea lege Iulia de prouinciis,  
 & lege Cornelia Maiestatis fuit cautū<sup>a</sup>.  
 iniussu enim populi, aut citra senatus  
 auctoritatem (cuius potestas omnis in  
 principem est collata<sup>b</sup>) nihil sanciri po-  
 terat, quod populum teneret<sup>c</sup>. Et qui-  
 dem, si in ciuilibus ac forensibus nego-  
 tiis, procurator, qui vel generali mādato  
 ad actionē constituitur, transigendi de-  
 cidendiq̄ue negotij facultatem non ha-  
 bet<sup>d</sup>: consequens est, cum qui bellige-  
 randi causa exercitui præpositus est, pa-  
 cem cum hostibus faciēdo, muneris sui  
 fines excedere. quod in re militari maxi-  
 mē vitiosum semper habitum fuit<sup>e</sup>. quā  
 quidem ob causam, pacem Caudinam a  
 T. Veturio, & Sp. Postumio, cum Sam-  
 nitibus factam, & foedusa C. Mancino,  
 cū Numantinis ictum, senatus ratum  
 non habuit: sicut nec Camillus dictator  
 pactiōnem illam, qua inter Sulpitium  
 quondam tribunum militum, & Bren-  
 num Gallorum regulum conuenerat, vt  
 Galli, acceptis mille pondo auri a Ro-  
 manis, obsidionem relinquerent, negās  
 eam pactiōnem ratam esse, quæ postquā  
 ipse dictator creatus esset, iniussu suo ab  
 inferio-

<sup>a</sup> Cic. in Pisg.

<sup>b</sup> l. 1. D. de  
 consuet. princ.  
<sup>c</sup> Cic. pro  
 Cor. Balb.

<sup>d</sup> l. mandato  
 generaii. l.  
 procurator  
 totorum. D.  
 de procurato.

<sup>e</sup> l. 3. §. in  
 bello. D. de re  
 milit.

DE IVRE ET OFF. BELL.

*a* *Livius lib. 4.* inferioris iuris magistratu facta esset<sup>a</sup>,  
 penes dictatorem enim summa potestas e-  
 rat <sup>b</sup>. & Sallustius, inter Aulū exercitus  
 Romani ducē, & Iugurthā Numidarum  
 regem facta: Senatus, inquit, uti par erat,  
 decrevit, suo, atq; populi iniussu, nullū  
 potuisse foedus fieri. Ex quibus constat,  
 nemini licere, iniussu principis, citra cri-  
 mē læsæ maiestatis cū hoste pacisci: cū  
 hoc sit summi principis <sup>c</sup>. qua potissimū  
 ratione, Ludouicū, ducē Aurelianēsem,  
 iure cæsum fuisse existimat Bodinus <sup>d</sup>:  
 quòd scilicet iniussu regis Galliæ foedus  
 iniisset cum duce Lancastrī. quare etiam  
 Duareno, quem alij sequuntur <sup>e</sup>, assen-  
 tiri non possum: qui hanc sententiam  
 veram esse putat, in eo, cui ducendi tan-  
 tum exercitus, regendique cura cōmissa  
 est: nō autem in eo, cui plena liberaque  
 rerum omniū potestas est concessa: quē  
 etiam ius pacem cum hoste faciendi ha-  
 bere vult <sup>f</sup>. quod non admitto. Nam ea  
 quæ sunt iuris publici, & regij, separatā  
 habēt a iure priuato causam <sup>g</sup>, & cū pri-  
 uatis cōmunicari non possunt: ut supe-  
 riore capite docuimus. vnde, quantum-  
 cunq; plena, & libera duci rerum omniū  
 potestas sit permessa, pacis tamē faciēde,  
 & cum

*b* *Pomp. de l.*  
*2. D. de orig.*  
*iur.*

*c* *l. conuentionum.*  
*D. de*  
*pacif.*  
*d* *de rep. lib. 7*

*e* *in l. l. con-*  
*ventionum.*

*f* *argumento*  
*l. procurator*  
*tus generali-*  
*ter. D. de pro-*  
*curatorib. et l.*  
*2. C. de offic.*  
*cuis qui vicē*  
*alt. et ibi Bar.*  
*g* *in l. 1. §.*  
*his quibus. D.*  
*de leg. 3.*  
*g* *l. 1. §. 1. D.*  
*de iust. & iur.*  
*l. conuention-*  
*um. D. de pac.*  
*Pulchrē Co-*  
*man. lib. 5. c. 1*

& cum hoste facultatē non intelligi cō-  
cessam arbitror. nā ea, quæ sunt iuris re-  
gij, nō veniūt sub quibuscunq; generali-  
bus verbis: sed demū si specialiter, & ex-  
pressè concedantur<sup>a</sup>. & quidē hoc casu,  
imperatori vel duci sancientiē pacis po-  
testate expressè cōcessa: q̄ sit extra ordi-  
nem: nec mandatum egredi poterit, nec  
alteri mādare: quia non habet eam iure  
magistratus & imperij, sed nudam legis  
actionem: ideoq; nihil pro suo imperio  
agit, vt inquit Iulianus<sup>b</sup>, sed pro eo, cu-  
ius mandatum accepit. nam vt iam sæpe  
diximus, ius belli & pacis apud summū  
principem residet, & in alium transferri  
non potest. sicque nimirū consules Ro-  
mani, penes quos erat summa auctori-  
tas, exercitu accepto, belli quidē gerēdi  
potestatem habuerunt: vtq; pro suo ar-  
bitrio lacerent, aut inuaderent hostē,  
ac militarem disciplinam sua voluntate  
regerēt; bellum autē indicere, aut finire,  
nisi ex senatus auctoritate, & iussu po-  
puli non potuerūt. itaq; inquit Liuius<sup>c</sup>,  
decreuit senatus, iubente populo, vt P.  
Scipio, ex decē legatorum sentētia, pa-  
cem cū populo Carthaginiēsi, quibus le-  
gibus ei videretur, faceret: & T. Quintio  
liberum

<sup>a</sup> text. elegās  
in cap. quod  
translationē;  
de off. legat.  
& in l. i. &  
ibi DD. D. de  
off. eius cui  
manda. est iu-  
risd. & in c.  
vni. que sint  
Reg. Molm. in  
cōsuetud. Pa-  
risien. tit. 2.  
§. 1. gloss. 5.  
facit tex. in l.  
ne procurato-  
res. D. de iur.  
fif.  
<sup>b</sup> in l. et si præ-  
tor. D. de off.  
eius cui mad.  
est iurisdic.

<sup>c</sup> lib. 40.

DE IVRE ET OFF. BELL.

liberum arbitriū pacis ac belli cum Phi-  
 lippo permissum est a. itē Hetruscis pax  
 data est, ijs legibus, quæ L. Æmilio conf.  
 viderentur optimæ: & Æquis, rex arbi-  
 trio Q. Fabij consulis b. idque sæpius a  
 Romanis factum fuisse legimus: sciebāt  
 enim, neminem imperatore verius æsti-  
 mare posse, qua mente pax peteretur, &  
 quo statu res essent. Enimverò de indu-  
 tiis\* idē quod de pace, plerisque respon- 6  
 dendum placuit c: licet contrarium sen-  
 serit Bartol. nam & hic a præscripto mā-  
 dati, sicut in superiore casu, receditur:  
 quandoquidē in ciuilibus negotiis, pro-  
 curatori tempus ad soluendum dare, nō  
 minus quàm transigere cum aduersario  
 interdictum sit d. quod equidē admitto,  
 si de longi tēporis indutiis agatur, quæ  
 non tam cessationem pugnæ cōcedere,  
 quàm bello finem imponere videntur:  
 quod summi imperij est. ideoque istius-  
 modi indutias nunquam a consulibus,  
 aliisque Romanorū imperatoribus, sed  
 a senatu, populoque Romano concessas  
 fuisse legimus. itaq; Samnites victi, pro  
 fœdere, quod petebant, biennij indutias  
 impetrarunt e. Similiter Veientibus,  
 Volsiniensibus, Æquis, aliisque quam-  
 plurimis,

a L. 1. vel. 42

b Dion. Hal.  
antiq. Romæ.  
lib. 9.

c ad l. con-  
ditionem. D.  
de pall.

d l. qui Ro-  
me. §. Calli-  
machus. D. de  
verbor. oblig.  
Dwarrenus in  
d. l. connētio-  
nem.

e Livius l. 9.

plurimis, in annos aliquot a senatu, & populo indutię datę sunt<sup>a</sup>. illas verò indutias, quę in breue, & in præsens tēpus fiunt, ne hostes inuicem se laceſſant, (de quibus Paulus loquitur<sup>b</sup>) cū bello finem non imponant (nam bellū manet; pugna ceſſat<sup>c</sup>) duces cum hoſte facere poſſe, exiſtimo: præſertim ſi temporis ratio, vel aliqua neceſſitas, vel utilitas id fieri ſuadet. imperio enim duci delato, pro ſuo arbitrio laceſſere, & inuadere hoſtem poteſt, & omnia ea, quę ad bellum ſpectant adminiſtrare. ſolent itaque Romani duces, hoſtibus pacem poſtulantibus, propria auctoritate indutias concedere: dum Romam legati ad pacē petendam mitterentur. Itaque Scipio Carthaginienſibus in tres meſes indutias cōceſſit: vt interim per legatos Romę de pace agerent<sup>d</sup>. Libo quoque, &

<sup>a</sup> *Linus l. 2. 4. 7. 9. & 10.*

<sup>b</sup> *in l. poſſibileſimum. D. de captiu.*

<sup>c</sup> *Gellius l. 1. cap. 25.*

<sup>d</sup> *Linus l. 40*

L præ-

DE IVRE ET OFF. BELL.

præidiis terrestribus præerat) impetrarunt. magnum enim, quod adferebant, videbatur, & Cæsarem id summè sciebāt cupere<sup>a</sup>. Leges quoque pacis ipsi duces dicere solent: quæ si acciperentur ab hostibus, indutias concedebant, dum de pace legatis suis Romā missis, in senatu agerent. vt Scipio cum Carthaginensibus secundò fecit<sup>b</sup>: eodemque auctore, L. Scipio frater, Antiocho deuicto conditiones pacis tulit, permisitque vt legatos de pace Romā mitteret<sup>c</sup>. & T. Quintius Nabidi, lacedæmoniorum tyranno, sex mensium indutias dedit, vt interim cōditiones pacis, quas illi præscripserat, a senatu confirmarentur<sup>d</sup>. & idē Quintius, Philippo indutiis in duos menses datis, vt de conditionibus pacis, de quibus inter ipsos actum erat, Romam legatos mitteret, permisit<sup>e</sup>. soletq; senatus plerunque, consilio ducis, pacem ab hostibus petitam, dare vel negare, vt modò diximus. alij verò populi non tantam facultatem suis ducibus concesserunt. Legimus itaque, cū inter Agidem lacedæmoniorum regem, & Trasylulū, Alciphronemque Argiuorum duces pactæ essent quattuor mēsiū indutiæ, factum fuisse,

<sup>a</sup> *Cæsar de bel. ciu. lib. 3.*

<sup>b</sup> *Linus l. 40*

<sup>c</sup> *Linus l. 47*

<sup>d</sup> *Linus l. 44*

<sup>e</sup> *Linus l. 42*

fuisse, auctore Alcibiade, ut eas Argiui ratas non haberent, & Lacedæmonios quoque eas irritas fecisse: quoseam ob causam adeo in regem suum indignatos fuisse scribit Thucydides, ut lege lata, duodecim consiliarios ei adhibuerint, sine quorum consilio, neque indutias, neque quodcūque fœdus cum hostibus ferire possent. reges autem Lacedæmoniorum, nullum imperium habuisse, neque fuisse sui arbitrij, satis constat<sup>a</sup>. Sed cum princeps, cui populus omne imperium in se potestatemque concessit<sup>b</sup>, de negotiis ad remp. spectantibus, rectè atque vtiliter paciscatur, siue pacem, siue aliud quodcunque fœdus cum hostibus faciat<sup>c</sup>: quærūt iuris interpretes, an pacem cum hostibus faciēdo, priuatorum 7 damna\* & iniurias, ob causam belli acceptas, possit remittere, vel etiam bonam ciuium hostibus concedere<sup>d</sup>. & quidem quod ad res bello captas attinet, dubiū nō est. cum etiam sine vlla principis participatione, iure belli, factæ sint hostium: idēque dicendum est de aliis damnis, & iniuriis iure belli illatis. quod ad alia verò, quæ non sunt hostibus acquisita, vel ab iniustis hostibus ablata: si aliter cōmuni

<sup>a</sup> Dion. Hal. lib. 2. B. d. in meth. hist. cap. 6.  
<sup>b</sup> l. 1. D. de const. princip.

<sup>c</sup> l. conuentionum. D. de pact.

<sup>d</sup> in d. l. conuentionum. Et in l. bene a. Zenone. C. de quadr. prescript. Ferdin. Vazq. illust. quest. lib. 1. cap. 4.

DE IVRE ET OFF. BELL.

omnium salutem consuli non possit, etiam illa civibus adimi, & hostibus concedi poterunt. communis enim utilitas singulorum commodo præferri debet<sup>a</sup>. & ut ait Plinius<sup>b</sup>, oportet privatis utilitatibus publicas, mortalibus æternas anteferre. Quò spectat quod Tacitus ait: Omne magnum exemplum habere aliquid ex iniquo, quod contra singulos utilitate publica rependitur. Itaque Trajannus, cum civitatem Atheniensem triginta tyrannorum sequitia liberasset, plebiscitum interposuit, ne qua præteritarum rerum mentio fieret: quæ malorum obliuio, ἀμνηστία ab ipsis vocitata, concussum & labentem civitatis statum, in pristinum habitum reuocavit<sup>c</sup>. quod & Cicero aliquando Romæ, publicæ quieti consulere volens, sequendum esse censuit<sup>d</sup>. Sed hoc tum maximè necessarium esse constat, cum occupata per iniuriam bona, longo temporis spatio possessa sunt: quæ si a possessoribus auferantur, restituanturque dominis, multa concuti, perturbarique sit necesse. ut in specie non absimili, cõsultus a Plinio Traianus imper. prudentissimè rescripsit<sup>e</sup>. alioqui certè nisi ex maxima necessitate, & pro magno reipub.

<sup>a</sup> Authent. que res, C. com. de leg. l. actione. §. Labeo. D. pro socio. L. vnic. §. penul. C. de caduc. tollen. <sup>b</sup> epist. lib. 7.

<sup>c</sup> Val. Max. lib. 4. cap. 1.

<sup>d</sup> Philipp. 1.

<sup>e</sup> lib. 10. e. epist. Plinij.

reipubl. bono non licet principi bona  
 ciuium ipsis adimere: quod iuri naturali  
 & diuino repugnat<sup>a</sup>. Etenim quamuis  
 8 princeps<sup>\*</sup> legibus solutus sit<sup>b</sup>: lege tamē  
 naturæ, vt Pyndarus dicebat, omnes re-  
 ges, & omnes principes tenentur: & vt  
 maximè larga sit principis potestas, ta-  
 men ad ea quæ iniusta sunt, non extendi-  
 tur. eoq; spectat, quod Plinius ad Traia-  
 num scribit<sup>c</sup>: Vt, inquit, felicitatis est,  
 posse quantum velis, sic magnitudinis,  
 velle quātum possis. vnde rescripta prin-  
 cipum ita intelligi debēt, vt sine incom-  
 modo alterius procedant<sup>d</sup>. & non valēt  
 illa rescripta, quæ ius alterius tollunt<sup>e</sup>.  
 Qua ratione donatio ducatus Mediola-  
 nensis ab imperatore Maximiliano, Lu-  
 douico XII. Gallorum regi facta, causa  
 belli fuit, propter ius quod Sfortiæ in  
 eundem ducatum prætendebant: quod  
 imperator non intelligitur voluisse do-  
 nare, nec potuit<sup>f</sup>. quamuis enim reges  
 9 dicantur domini omnium<sup>\*</sup>, hoc quoad  
 maiestatem, & imperium debet intelligi,  
 non quoad proprietatem & possessio-  
 nem, quæ est singulorum<sup>g</sup>. quod elegā-  
 ter Seneca expressit<sup>h</sup>, cum ait: Ad reges  
 potestas omnium pertinet; ad singulos

<sup>a</sup> l. n. in hoc  
 iure. D. de  
 cond. indeb. l.  
 si priuatus.  
 D. qui et a  
 gub.  
<sup>b</sup> l. princeps.  
 D. de legibus.

<sup>c</sup> in Panegy.

<sup>d</sup> l. 2. §. si  
 quis a princi-  
 pe. D. ne quid  
 in loc. publ. l.  
 rescripta. C.  
 de precib. imp.  
 offe.  
<sup>e</sup> l. 2. C. de  
 precib. imp.  
 offer.

<sup>f</sup> refert Bo-  
 din. de rep. l. 1.  
 cap. 9.

<sup>g</sup> l. in rem a-  
 ctio. D. de rei  
 vend. et toto  
 tit. D. de acq.  
 rer. d. m.

<sup>h</sup> lib. 7. c. 4.  
 et 5. d. benef.

DE IVRE ET OFF. BELL.

proprietas : & paulo post; Omnia rex imperio possidet, singuli dominio : omnia sunt in imperio Cæsaris, in patrimonio propria. Quare Aratum Sicyonium iure laudatum fuisse refert Cicero <sup>a</sup> : qui cum oppresso Niocle tyranno patriam liberasset: quæ quinquaginta annis a tyrannis tenebatur, & plurimos exules restituisset, quorum bona alij possederant, & tam longo spatio multa hereditatibus, multa emptionibus, multa dotibus detineri, atque sine iniuria neque possessoribus adimi, neq; his non satisfieri, quorum illa fuerant videret: grandi pecunia a rege Ptolomæo iuuatus, adhibuit sibi in consilium quindecim principes, cum quibus causas cognouit, & eorum qui aliena detinebant, & eorum qui sua amiserant : perfecitque æstimandis possessionibus, vt persuaderet aliis, vt pecuniã accipere mallent & possessoribus cederent; aliis vt cõmodius putarent, numerari sibi quod tanti esset, quàm suum recuperare. itaq; perfectum est, vt omnes constituta concordia, sine querela decederent. Similiter Brutus & Cassius, post necem Cæsaris (quãdoquidem acta eius rata haberet e rep. visum erat) veteribus posses-

possessoribus, quibus Sylla & Cæsar bel-  
 lis ciuilibus agros ademerāt, saltem pre-  
 cium ex publica pecunia numerari de-  
 bere censebant: quo & illis satisfactum,  
 & aliis securior esset possessio<sup>a</sup>. Porro  
 10 queritur an mortuo principe\*, cum quo  
 foedus ictū est, maneat foedus cum prin-  
 cipe qui successit. & quidem, quamuis  
 quoad alios contractus, distinguendum  
 videatur: successerit ne tanquam heres,  
 qui ex facto defuncti tenetur<sup>b</sup>: an verò  
 ex statuto, vel per electionem, qui factū  
 defuncti non præstat: personalis enim  
 obligatio nō manat ad successorem, nisi  
 hereditariū<sup>c</sup>: etiam si quis expressè pro-  
 miserit pro se, & successoribus suis<sup>d</sup>. ta-  
 men quoad foedera, aliāque conuentio-  
 nes publicas, quæ non nomine proprio,  
 sed reip. ineuntur (quæ æquè repræsen-  
 tatur per successores, vt per eos qui sunt  
 hodie<sup>e</sup>) principem omnino ex cōtractu  
 defuncti teneri dicendum est, & foedera-  
 tos foedere astrictos manere<sup>f</sup>. Non itaq;  
 fuit legitima causa rebellandi Veienti-  
 bus, & Fidenatibus, regnante Tullo Ho-  
 stilio, neque Latinis, regnāte Tarquinio  
 Prisco, qui post Anci obitū se religione  
 foederis solutos existimabāt: neque He-

<sup>a</sup> Appian. de  
bell. ciuil. i. 2.

<sup>b</sup> l. cū a ma-  
tre. C. de rei  
vendic.

<sup>c</sup> l. ult. §. ult.  
D. de contra.  
empt. l. 1. §. si  
heres D. ad S.  
C. Treb. l. ult.  
C. de her. uel.

<sup>d</sup> l. stipulatio  
ij. a. D. de  
verbor. oblig.

<sup>e</sup> l. propone-  
batur. D. de  
iudi.

<sup>f</sup> c. 1. de pro-  
bat. & ibi  
DD. c. quia

iuxta. 16. q. 2.  
Iason & alij  
in l. 1. col. 3.

D. de consti-  
t. princ. not. 113  
c. v. t. ne prælo-  
uices suas.

DE IVRE ET OFF. BELL.

truscis, qui defuncto Tarquinio Prisco, cuius imperio se submiserant, nolebant amplius stare conditionibus foederis<sup>a</sup>.

<sup>a</sup> Dion. Hal. ant. Rom. l. 3. c. 4.

& iure Romani Perseo bellū intulerunt, qui legatis ipsorū, foedus cum Philippo patre ictum, ad se nihil pertinere respōdit<sup>b</sup>. Si tamē per istiusmodi foedus resp.

<sup>b</sup> Livius l. 42

enormiter sit læsa, successorē non teneri plerisque visum est<sup>c</sup>. quod admitto, si hac conventionē quid ex iis, quæ regiae coronæ sunt annexa, sit alienatum, citra populi vel ordinum consensum, qui ad hoc requiritur<sup>d</sup>: vel si maiestas principis sit imminuta, quod in præiudicium defuncti fieri non potuit<sup>e</sup>. & ne ab initio quidem istiusmodi conventiones vllō modo subsistere potuerunt<sup>f</sup>. Ex his cō-

<sup>c</sup> Cyn. & DD. in l. digna vox. C. de const. prin. cap. Bald. in c. 1. de nat. feud. d. c. 1. de rer. permutat. c. non liceat. 1. 12. qu. 1. latē Ioa. Papon. in: rest. lib. 5. tit. 10. c. c. innot. ut. de elect. § dixi 3. c. 5.

stat, omnium firmissima esse illa foedera<sup>a</sup>, quæ inter vtrumque regem, & vtrumq; populum hinc inde ineūtur. quò spectat quod Hernici, legatis Romanorum expostulantibus de iniuriis & atrociniis, responderunt, sibi nunquam foedus intercessisse cum Rom. populo: quod autē cum rege ictum esset Tarquinio, iam finitū existimare, morte ipsius & exilio<sup>g</sup>. Itaq; Eduardo eius nominis quarto regi Angliæ, regno pulso, cū ex foedere au-

<sup>g</sup> Dion. Hal. lib. 8.

xilium

xilium regis Galliæ imploraret, respon-  
sum fuit, antiquo foedere vtrumque re-  
gem, & vtrumque populum vtrinque  
obstrictos esse: atque ita pulso Eduardo,  
foedus manere cum populo, & rege qui  
regnabat<sup>a</sup>. Latini verò, cùm Tarquinij  
in exilium acti Romanis bellū inferrent,  
vtrisque auxilia negauerunt, quòd reli-  
gione vetarentur, tam contra Tarqui-  
nios, quàm cōtra Romanos bellum ge-  
rere: quandoquidem ex æquo vtrisque  
foedere iuncti essent<sup>b</sup>.

<sup>a</sup> refert Bo-  
din. de rep. l. 1  
c. 7.

<sup>b</sup> Dion. Hist.  
lib. 5.

DE INSIDIIS ET FRAUDE  
HOSTILI.

- 1 *Ex insidiis pugnare licet.*
- 2 *Bonus dolus quis.*
- 3 *Stratagemata imperatori laudem pariunt.*
- 4 *Romani veteres omnes fraudes aspernati sunt.*
- 5 *Veteres nonnunquam sola opinione syn-  
cera fidei plus profecere, quàm armis.*

CAP. OCTAVVM.

CVM quis bellum susceperit, inquit  
D. Augustinus<sup>c</sup>, vtrum apertè pu-  
gnetur; an ex insidiis\*, ad iustitiam nihil  
attinet: & bonum dolum\* (quod pro so-  
lertia

<sup>c</sup> in c. Domi-  
nus miles. 23  
quasi. 2.

DE IVRE ET OFF. BELL.

lertia accipiebant veteres) dicit esse Vl-  
 pianus, cum quis aduersus hostem, la-  
 tronemue quid machinatur<sup>a</sup>. itaq; op-  
 timus imperator Lyfander dicebat, vbi  
 leonina pellis deficeret, vulpinam esse  
 assuendam<sup>b</sup>. & poëtæ finxerunt, Hercu-  
 lem Nemeæ leonis pellem pro armis  
 habuisse, & sagittas tinctas felle & san-  
 guine Hydræ Lernææ. quo indicant bo-  
 num imperatorem calliditatem simul  
 cum fortitudine coniungere debere: eo-  
 que spectat illud Virgilianum:

*Dolus an virtus, quis in hoste requirat.*

Quæ sententia vera est, quatenus fides  
 non violetur<sup>c</sup>. neque enim Dionysio  
 tyranno similes esse debemus, qui dice-  
 bat pueros talis, viros iureiurando fal-  
 lendos esse<sup>d</sup>: aut Persas imitari, quibus  
 fides dictis factisque nulla erat, nisi qua-  
 tenus expediret<sup>e</sup>. alioqui verò & Iosue  
 hostibus suis, ipso auctore Deo, insidias  
 struxisse legitur<sup>f</sup>. & Pittaci Mitylenei  
 (qui vnus ex septē sapientibus fuit) stra-  
 tagema laudatur, qui cum Phrynone A-  
 theniēsum duce certaturus, cui in cassi-  
 de piscis imagūcula erat, rete in stadium  
 detulit, & exclamans se piscē petere, eum  
 reti inuoluit, sicque se extricare nescien-  
 tem,

<sup>a</sup> in l. 1. §.  
 non fuit. D. de  
 dolo.

<sup>b</sup> Plut. in A-  
 poph.

<sup>c</sup> c. noli. 23.  
 qu. 1.

<sup>d</sup> Plut. de for.  
 vel virt.

<sup>e</sup> Iustini. l. 12.

<sup>f</sup> Iosue 8.

tem, confecit. Rectè itaq; Agesilaus dicebat, impium quidem esse fidem datam violare, hostes autem decipere, non iustum modò esse, sed suaue etiam, & lucrosum <sup>a</sup>. Cambyfes verò a Cyro apud <sup>a Plut. in A-  
poph. -</sup> Xenophontem interrogatus, qua potissimum ratione vincendum esset, respondit, si victoria cupitur, quacunque arte capiendi sunt hostes, occultis insidiis, dolo, fraudeque fallendi, & furto & rapinis exhauriendi. sic opportunum aliquando mendacium imperatoris, victoriam dedit: vt illud Valerij Leuini, qui exclamauit Pyrrhum a se interemptum esse, cum militis cuiusdam cede gladium cruentum haberet: quo factum est, vt Epirote consternati, in castra quam primò pauidi ac flentes se reciperent. Similiter T. Quintius cons. cum Volscis pugnans, gradum referentibus suis, salubri mendacio fugere hostes a cornu altero clamitans, concitauit acie & impetu facto, dum se putat vincere, vicere <sup>b</sup>. Quæ quidem stratagemata \* maximam imperatori laudem & gloriam dare solent. Hac autem cauendi & fallendi arte, Philippus Macedo insignis habitus fuit: gaudebat etenim longè magis, decepto per dolum hoste,

DE IVRE ET OFF. BELL.

hoste, quàm aperto Marte superato : vt qui diceret, victoriam per dolum & calliditatem sine suorum clade semper esse, illam autem, quæ collatis signis fieret, nunquam sine cruore. Pœni quoque, inter quos Annibal clarus exstitit, & Græci plurimum hisce calliditatis & fallendi artibus gloriati sunt. quod improbandum non esset, nisi etiam fidem tam facile violassent. at veteres illi Romani\* 4 omnes has fraudes & fallacias aspernati sunt, & non nisi vera virtute, & aperta vi, Romanisque artibus, vt illi dicebāt, vincere voluerunt. sed posterioribus temporibus Romani, spreta hac maiorum suorum sententia, fallendi, decipiendiq; artibus sibi, rei que publicæ consulere potius habuerunt. itaque Q. Martius, & A. Attilius, qui legati ad Persen Macedonum regem missi erant, reuersi, nulla re magis in senatu gloriati sunt, quàm decepto per indutias, & spe pacis hoste: adeo enim apparatus belli fuisse instructum, ipsis nulla parata re, vt omnia oportuna loca præoccupari ante ab eo potuerint, quàm exercitus in Græciam traiceretur : spatium autem indutiarum sumpto, vterum illum nihilo paratio-

re ma

rem : Romanos omnibus instructiores rebus coepturos bellum. hæc, vt refert Liuius<sup>a</sup>, vti summa ratione acta, magna pars senatus approbabat. veteres autem, quibus hæc noua minus placebant sapientia moris antiqui memores, negabant se in ea legatione romanas agnoscere artes : non per insidias, & nocturna prælia, nec simulatam fugam, improuisosque in incautum hostem reditus, nec vt astu magis quàm verà virtute gloriarentur, bella maiores gessisse : indicere prius, quàm gerere solitos bella : denunciare etiam : interdum locum finire, in quo dimicaturi essent. eadem fide indicatum Pyrrho medicum vitæ eius insidiantem : eadem Faliscis vinctum traditum proditorem filiorum regis. hæc Romana esse, non versutiarum Punicarum, neque calliditatis Græcæ, apud quos fallere hostem, quàm vi superare, gloriosius fuit. interdum in præsens tempus plus profici dolo, quàm virtute, sed eius demum animum in perpetuum vinci, cui confessio expressa esset, se neque arte, neque casu, sed collatis cominus viribus, iusto ac pio bello esse superatos. Hæc, vt inquit Liuius, seniores, quorum sententia  
accepta

DE IVRE ET OFF. BELL.

accepta non fuit. Legimus tamē veteres illos\*, nonnūquam sola opinione huius 5 veræ virtutis, & synceræ fidei, plus profecisse, quàm inuictis Romanorum armis. idque in primis probatur exemplo Camilli: nam cū Faliscos obsideret, qui alioqui diuturnus videbatur futurus labor, tradēdo ludimagistrum, principum Faliscorum pueros prodentem, quòd se non nisi Romanis artibus, virtute, opere, armis, velle vincere diceret: ita fides Romana, vt refert Liuius<sup>a</sup>, & iusticia imperatoris, in foro & curia apud Faliscos celebrata fuit, vt consensu omnium, legati ad Camillum in castra, atque inde permissu Camilli Romā ad senatum, qui dederent Faliscos, profecti sint: qui in senatum introducti, inter cetera, hæc verba protulisse traduntur. Euentu huius belli, duo salutaria exempla humano generi prodita sunt: Vos fidem in bello, quàm præsentem victoriā maluistis; nos fide prouocati, victoriā vtrò detulimus. Sic quoque Fabritius pari virtutis specie, Pyrrhum, qui armis superari non poterat, vicit, prodens illi medicum vitæ eius insidiantem: cumq; ei Pyrrhus captiuos gratis redderet, nō accepit

a lib. 5.

accepit ea cōditione, sed totidem captiuos reddidit, ne mercedem beneficij accipere videretur, non gratia aliqua in Pyrrhum collati, sed ne putarentur Romani dolo interficere quenquam, tanquā aperto Marte vincere non valentes. idque eius factum a senatu laudatū fuit, qui magnum dedecus & flagitium iudicabant, qui cum laudis certamen fuisset, eum non virtute, sed scelere superatū<sup>a</sup>. cui simile est, quòd Dauid cum Saule bellum gerens, cum potuisset illū semel, & iterum ex improviso nullo negotio e medio tollere, noluit, & iurauit, nisi fortè in prælio descendens Saul periret, aut dominus illum percuteret, se non extensurum manum in christum Domini<sup>b</sup>. Porro Q. Seruilio Cæpioni vitio datum fuit, quòd Viriatum per fraudem & insidias & domesticos percussores sustulisset, quare dicebatur non tam victoriam meruisse, quàm emisse<sup>c</sup>. Fabius tamen Maximus summus imperator habitus fuit, quòd non quidem dolo ageret, sed facilè celaret, taceret, dissimularet, insidiaretur, præriperet hostium consilia<sup>d</sup>.

<sup>a</sup> Plut. in Ac.  
popl. Cicero  
off. lib. 3.

<sup>b</sup> Reg. 1. c. 26

<sup>c</sup> Val. Max.  
lib. 9. cap. 76  
L. Flor. lib. 2.  
c. 17.

<sup>d</sup> Cicero. offic.  
lib. 1.

DE IVRE ET OFF. BELL.  
DE IVRE LEGATORVM.

- 1 *Legati inuiolabiles.*
- 2 *Legatum hostium pulsans dedi hostibus solet.*
- 3 *Legati legationis munus excedere non possunt.*
- 4 *Ius legatorum hostibus tantum conuenit.*
- 5 *Rebellis, etiam si munere legationis fungatur, non est inuiolabilis.*
- 6 *Ad rebelles legatos mittere, maiestati principis non conuenit.*
- 7 *In legatis spectanda prudentia & dignitas.*
- 8 *Nonnumquam mulieribus legationes commissa.*

CAPVT NONVM.

**L**egati apud \* omnes gentes semper tuti, & inuiolabiles fuerunt, quod iure gentium inductum est<sup>a</sup>: & a Romanis sancti dicti, a sagminibus, quæ legati populi Romani ferre solent: sicut legati Græcorum ferebant ea, quæ κρηυελα vocantur, vt refert Marcianus<sup>b</sup>. Itaque qui legatum hostium pullasset \*, aut iniuria<sup>2</sup> affecisset, dedi hostibus solet<sup>c</sup>: quod & iure feciali cautum fuisse diximus. Sic M. Æmilio Lepido, C. Flamínio conf. L. Minucius Myrtibus, & L. Manlius, quòd

<sup>a</sup> l. ult. D. de legatio. c. i. v. gentiū. dist. 1.

<sup>b</sup> in l. sanctū. D. de rer. diuis.

<sup>c</sup> d. i. ult. D. de legatio.

quòd Carthaginiensium legatis manus  
intulerant, iussu M. Claudij pr. vr̄bis, per  
feciales, traditi sunt legatis, & Carthagi-  
nem auecti <sup>a</sup>. & Q. Fabius & Cn. Apro- <sup>a</sup> *Liuius l. 38*  
ninus Ædilitij, quòd legatos, ab vr̄be A-  
pollonia, Romam missos, orta conten-  
tione, pulsassent, continuò per feciales  
dediti sunt <sup>b</sup>. & quidem nisi dederentur, <sup>b</sup> *Val. Max.*  
qui legatos violassent, vel si publico cõ- <sup>lib. 6. c. 6.</sup>  
silio id factum esset, bellum legitimè in-  
ferri solet. Itaq; Fidenatibus atrox bel-  
lum illatum a Romanis, quòd legatos  
eorum interfecissent, iussu Tolummij  
regis Veientium, ad quem defecerant <sup>c</sup>: <sup>c</sup> *Liuius l. 4.*  
& Illyricis ob legatos securi percussos <sup>d</sup>. <sup>d</sup> *Florus. l.*  
Sed & Dauid intulit bellum regi Am- <sup>2. cap. 5.</sup>  
monitarũ, propter derisos legatos suos <sup>e</sup>. <sup>e</sup> *Reg. 2. c. 20*  
iniuria enim facta legatis, censetur facta  
principi vel reipub. cuius legatione fun-  
guntur <sup>f</sup>. Sed etsi bello subito exorto, <sup>f</sup> *c. accusatio.*  
qui apud vtrumque populum inueniũ- <sup>in sin. 2. q. 7.</sup>  
tur, ex hostibus serui efficiantur, licet in <sup>et Reg. 2. c. 10</sup>  
pace venerint <sup>g</sup>: tamen legatos liberos <sup>g</sup> *l. in bello. §*  
manere, Pomponius respondit: idque <sup>1. D. de capti.</sup>  
iuri gentium conuenire <sup>h</sup>. Et hæc certè <sup>h</sup> *in l. vit. D.*  
summa ratione legatis tributa sunt: vt <sup>de legation,</sup>  
essent, qui vtrò citroque, de cõditioni-  
bus pacis, foederis, indutiarum, tutò a-  
M gere

DE IVRE ET OFF. BELL.

gere possent: qui sæpe paruo labore, maximas controuersias tollūt. Itaque Romani, cū belli pacisque iura, tum potissimū ius legatorum inuiolabile esse voluerunt: vsque adeò, vt Scipio Africanus, cū onustā multis, & illustribus viris Carthaginiensium nauem, in suam potestatem redegisset, inuiolatam eam dimiserit: quia se legatos ad eum missos dicebant: quāuis manifestum esset, illos vitandi periculi gratia, falsum legationis nomen amplexos fuisse: sed maluit Scipio Romani imperatoris potius decertam fidem, quā frustra imploratam iudicari<sup>a</sup>. Itē cū Tarquinij, iam regno pulsī, Romā legati venissent, res ablatas repetitum, occulteque cum nobilibus adolescentibus, de rege reducendo tractarent: re detecta, quanquam visi essent commisisse, vt hostium loco haberētur, valuit tamen, vt ait Liuius<sup>b</sup>, ius gētium. Similiter cū Volsci misissent aliquos exploratores, specie legatorum in castra Romanorum, qui explorarent eorū numerum, & apparatus belli: quamuis conuictos & cōfessos, tamen Postumius dictator, a concitata ad feriendum multitudine, incolumes seruauit, inani legationis

<sup>a</sup> Vel. Max.  
lib. 6. c. 6.

<sup>b</sup> lib. 2.

tionis nomini tantum tribuens: ne scilicet daretur hostibus aliquis honestus belli prætextus, simulaturis legatos violatos, contra ius gentium <sup>a</sup>. quo tamen <sup>a Dion. Hal. art. Ro. lib. 6</sup> exemplo non putarem legatos similia molientes, omnino iure tutos esse, cum

3 legati nihil extra legationis munus <sup>\*</sup> agere possint <sup>b</sup>. Iure itaq; Galli, cum Clusinos inuasissent, vidissentque Fabios legatos Romanorum (qui ad eos missi erant, vt peterent ne Clusinos socios offenderent) post exequutam legationem, arreptis armis contra ius gentium, cum Clusinis in acie versantes, missis Romam legatis suis, questum iniurias, postulatamque, vt pro iure gentium violato, Fabij dederentur: cum non impetrassent; imo de quorum poena agebatur, tribunos militum in sequentem annum creatos audirent: flagrantes ira, ob honorem vltro habitum violatoribus iuris humani, elusamque legationem: omissis Clusinis, Romam rectam perrexerunt, & Romanis acie ad Alliam fuis, urbem ceperunt & deuastarunt. que calamitas, vt inquit Liuius <sup>c</sup>, Romanis superuenit, ob violatum <sup>c lib. 57</sup> ius gentium. Porro sciendum est, hoc

4 ius legatorum <sup>\*</sup>, quemadmodum & reli-

DE IVRE ET OFF. BELL.

qua iura belli, hostibus tantum conuenire, non etiam latronibus, rebellibus, aliisque, qui hostium numero non continentur<sup>a</sup>. qua de re alio loco diximus supra<sup>b</sup>. vnde Cicero<sup>c</sup> reprehendit, quod tantum tributum esset legato Antonij, cui portas vrbis patere ius non erat: & eidem reditum ad Antonium prohiberi debere censebat. Iure quoque Theodosius imperator, legatum tyranni cuiusdā sibi rebellis, in carcerem coniecit: & Carolus V. imper. legatos ducis Mediolanensis sibi subditi, & bellum machinantis carcere cōclusit<sup>d</sup>. sed nec ciues, nec subditi<sup>e</sup>, qui malo consilio, & proditoris animo apud hostes sunt, quos hostiū loco haberi voluit Paulus<sup>f</sup>: etiamsi munere legationis fungantur, iure gētium tuti erunt. quamuis enim loco hostium habeantur, non tamen iure, quo hostes vtuntur, vt alibi ostendimus<sup>g</sup>. sunt enim rebelles, & iniusti hostes, neque se vlla ratione, principis sui iurisdictioni, & potestati, quæ vbique locorum subditos tenet, eximere possunt<sup>h</sup>. non magis, quā Barbarius Philippus seruus, qui cum Romæ prætor factus esset<sup>i</sup>, & a domino, qui eum persequabatur, in seruitutem

a *hostes*. D. de capti. l. hostes. D. de ver. signif. b c. 2. & 6. c *Philipp*. 8.

d refert *Boetius*. de rep. l. 1 c. 6.

e in l. postliminium. §. transfug. D. de capti.

f *1*. de bello iusto, et de fi. de hosti seruanda.

g l. ult. D. de decret. ab ord. fac. l. mercatores. C. de commer. c. vt armu. arm. de constit. in 6. h l. 2. D. de off. præ.

ritem vindicaretur, precio se redemit:  
 vt ex Suida refert Bodinus<sup>a</sup>, qua ratione a lib. 1. cap. 6  
 etiam iure cæsi videntur, a Cæsarianis,  
 Rangonus & Fregosa, Caroli v. imper.  
 subditi, legati regis Galliæ ad Turcam:  
 quamuis iniussu Cæsaris id factum sit.  
 6 Ad rebelles\* verò legatos mittere, maie-  
 stati principis nullo modo cōuenit, ita-  
 que Cicero restitit, quantum potuit, ne  
 legati mitterētur ad Antonium, reipub.  
 bellum inferentem. non enim verbis ro-  
 gandum, sed cogendum armis: quòd nō  
 cum hoste, sed cum ciue res esset <sup>b.</sup> & b Philipp. 5.  
dixi supra c. 2  
et 6.  
 quidē Deus ipse adeo detestatus est re-  
 belles, & schismaticos, vt cū homo  
 Dei missus esset ad Hieroboam (ad quē  
 decem tribus Israël relicto rege suo de-  
 fecerant) qui ei peccata sua exprobraret;  
 panem apud illos edere, & aquā bibere  
 vetaretur. & cū non custodisset, & cō-  
 tra præceptū domini prandisset, vltione  
 diuina, in reditu a leone necatus fuerit <sup>c.</sup> c Reg. 13. e.  
denique. 7 9.  
1.  
 neque solū indignū est maiestati prin-  
 cipis, legatos ad subditos rebelles mit-  
 tere, sed etiam minimè tutum est. non e-  
 nim sperandum est. iura gentium sancta  
 fore apud eos, qui iura diuina & huma-  
 7 na contemnunt. Ceterum in legatis\*

DE IVRE ET OFF. BELL.

maximè spectanda est prudētia & dignitas. Carthaginienses enim cūm Romam de pace legatos misissent, non impetrauerunt: quōd iuuenes, & nullius dignitatis legati missi essent, & qui per ætatē non meminisse se dicerent, ea quæ superioribus foederibus acta essent: qua de causa etiā suspecti habiti, & punica fraude electi putabātur: qui veterem pacem repeterent, cuius ipsi non meminissent. tandem verò, cūm iam maximè attritis rebus Carthaginiensium, Hannonem Magnum & Asdrubalem Hædum, aliosque ætate dignitateque conspectos ad pacem petendam Romā mitterent: tum demū Carthaginienses verè, & ex animo de pace agere dixerunt Romani, quare & pacem dederunt<sup>a</sup>. Scitum quoque illud Catonis, de legatis Romanorū missis ad componēdam pacem inter Nicomedem & Prusiam: quorum vnus saxo quondam in caput percussus, foedas cicatrices præferbat: alius laborabat pedibus: tertius vsque ad stultitiā simplex habebatur: ita vt Cato in illam legationem cauillaretur, eam nec mentem habere, nec pedes, nec caput<sup>b</sup>. In legato quoque nōnunquam prodest grauitas, & rei-

<sup>a</sup> *Linium l. 30*  
*Appian. de bel.*  
*punic.*

<sup>b</sup> *Appian. de*  
*bell. Misbrid.*

& reipub. causa seueritas: exemplo C. Popilij: cui cùm Antiochus veniēti dextram porrigeret, tabellas ei Popilius S. C. (quo iubebatur, vt rex bello, quo Ptolemæum laceſſebat, abſtineret) continentes tradidit. quibus perlectis, cùm ſe cum amicis conſultaturum, quid faciendum ſibi eſſet, Antiochus diceret: Popilius, pro cetera aſperitate animi, virga, quam in manu habebat, circumſcripſit regem, ac, Priuſquam hinc decedas (inquit) redde reſponſum ſenatu, quod feram, quo tam violento imperio obſtupefactus rex, cùm parumper hæſiſſet, faciam (inquit) quod cenſet ſenatus: ac tum demum Popilius dextram regi, tanquam ſocio atque amico porrexit<sup>a</sup>. Nonnunquam verò etiam mulieribus\*, cum maximo fructu & reipublicæ vtilitate, legationes cõmiſſæ ſunt. itaque regnante Romulo, bello Sabino S. C. factũ fuit, quo Sabinis mulieribus, filios Romæ habētibus, facultas data eſt, relictis apud viros filiis, legationem obeundi apud Sabinos: cuius legationis princeps fuit Herſilia. quæ pacem compoſuerunt inter Romulum, & Tatium Sabinorũ regem. qua de cauſa a regibus

<sup>a</sup> *Liuius l. 45*  
*Val. Max. lib.*  
*6, cap. 4.*

DE IVRE ET OFF. BELL.

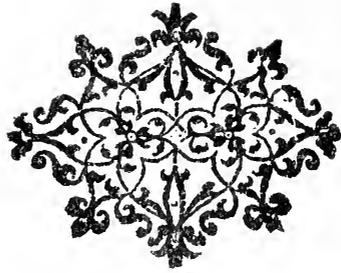
<sup>a</sup> *Dian. Hal.  
ens. Ro. lib. 2*

magni honores illis concessi sunt <sup>a</sup>. Præ-  
terea cùm Marcius Coriolanus, iniquo  
exilio multatus, ad vindicandam iniu-  
riam, fufis ac cæsis aliquot exercitibus  
Romanorum, ad ipsa moenia vrbis ac-  
cessisset, & neque legati ad eum depre-  
candū missi, neq; sacerdotes cum infulis  
quicquam proficerent: Veturia mater,  
Volumniam vxorē eius cum liberis se-  
cum trahens, filium precibus suis, & la-  
crymis expugnauit, & exarmauit <sup>b</sup>. atq;  
ita, vt inquit L iuius <sup>c</sup>, quam armis viri  
defendere vrbem non potuerunt, mu-  
lieres precibus, lacrymisq; defenderunt.  
Populus quoq; Romanus Mutiam, ma-  
trem Pompeij, minis adegit, vt legatio-  
nem ad eum susciperet: qua instigante,  
vna cum Iulia vxore, foedus inter Pom-  
peium, Antonium, & Octauium Cæsa-  
rem percussum est <sup>d</sup>. estq; memora-  
bile, quod de Celtis legimus, qui con-  
sultationibus de bello, & pace mulieres  
suas adhibebant, & lites cum sociis or-  
tas, earum ope discutiebant: ex eo, quod  
quondam, cùm e graui, & implacabili  
discordia, in bellum ciuile incidissent,  
mulieres inter media arma progressę cō-  
trouersias omnes mira quadam dexteri-  
tate

<sup>b</sup> *Val. Max.  
lib. 5. cap. 4.  
L. Florus. li. 1.  
cap. 22.  
c lib. 1.*

<sup>d</sup> *Appian. de  
bello ciuili. li. 5*

tate composuerant : & concordiam stabiluerant . vnde in suo etiam foedere, quod cum Annibale percusserunt, scriptum fuit: si Celtæ haberent, quo nomine Carthaginenses acculaient, iudiciū fore Carthaginensium ducum ac præfectorum in Hispania: si verò Carthaginenses Celtis aliquid obijcerent, causæ cognitionem fore penes Celtarum mulieres -. Ceterum prudenter M. Cato a Plut. de virt. mul. censuit, non esse publicè audiendos tres oratores Atheniensium, Carneadem, Critholaum, & Diogenem: quòd sciret eos tantum valere eloquentia, ut quæcunque vellent, persuadere possent, tam æqua, b Pet. Crimi. de honest. discipl. lib. 22. cap. 4. quàm iniqua. <sup>b</sup>





DE IVRE ET OFFICIIS  
BELLICIS, ET DISCIPLINA MI-  
LITARI,

LIBER SECVNDVS.

DE OFFICIIS BELLICIS.

- 1 *Non nisi ex iusta causa bellum gerendum.*
- 2 *Dominandi cupiditas multa mala secum adfert.*
- 3 *Ad bellum non nisi necessario veniendum.*
- 4 *Nonnunquam victoria plus amittitur, quam acquiritur.*
- 5 *Secunda moderatè, aduersa fortiter ferenda.*
- 6 *Romani neque victores insolescere, neque victi deprimi solent.*
- 7 *Dua praecepta Platonis ad officia bellica maximè spectant.*
- 8 *Vir fortis nihil pro sua, omnia pro communi utilitate faciet.*
- 9 *Quaecunque ratione patria consulendum.*
- 10 *Mori pro republica gloriosum.*
- 11 *Non sunt damnandi, qui in bello se obijciunt mortis periculo.*

DE IVRE ET OFF. BELL.

- 12 *Pro patria salutelicet patrem vel filium occidere.*  
13 *In bello non est suscipienda defensio eorum, quæ commodè defendi non possunt.*  
14 *Non temerè deferenda, quæ hostium impetum ferre possunt.*  
15 *Non nimium sauiendum in victos.*

CAPVT PRIMVM.

offic. lib. 1.



b Quintus  
Curt. lib. 4.  
c de civit. Dei  
lib. 3. c. 10.

Vm primum iusticiæ munus fit, vt inquit Cicero<sup>a</sup>, ne cui quis noceat, nisi laceffitus iniuria: ad officia bellica in primis spectat<sup>\*</sup>, vt non nisi ex iusta causa bellū geratur, ne ius humanæ societatis violetur: & absit omnis dominandi cupiditas, quæ non solum cum iusticia pugnat, sed solet etiam secū adferre multa incōmoda<sup>\*</sup>. nam, vt inquit Liuius, nulla magna ciuitas quiescere potest: si foris hostē nou habet, domi inuenit: vt præualida corpora ab externis causis tuta videntur, sed suis ipsa viribus onerātur: & vt legati Darij Alexandro dicebant, periculosum est prægraue imperium: & difficile continere, quæ capere non possis<sup>b</sup>, quare D. August<sup>c</sup>. Quemadmodū (inquit) in corporibus hominum, fatius est mo-

est modicam staturam cum sanitate habere, quàm ad molem aliquam giganteam perpetuis afflictionibus peruenire: nec cum perueneris quiescere; sed quanto grauioribus membris, tãto maioribus agitari malis: sic imperium paruum & quietum, præstat magno & inquieto. quod indicasse quoque videtur Calanus Indus, in philosophiæ studiis magni nominis: qui ad Alexandrum Magnum veniens, bubulam pellem aridam, in medium coniecit, obambulanfque eius extrema pedibus premebat: pellis cum ad vnam tantum partem calcaretur, reliquis in altum attollebatur. eo factò, media deinceps firmus institit, atque ita pellis vndique immota conquieuit. tali exemplo Alexãdrum commonens, ne in longinquis locis tempus tereret, sed imperij medium tueretur. ita enim in eius finibus quietura omnia<sup>a</sup>. a in vitã Alexand. idque etiam Lacedæmoniorum exẽplo satis docemur: qui cum terra marique vniuersæ Græciæ imperarent, tantaque iam dominandi cupiditate flagrarent, vt Asiam omnem suo imperio subigere affectarent: tantum ex ea re inuidiæ, atque odij contraxerunt, vt & imperium, & libertatem

DE IVRE ET OFF. BELL.

bertatem amiserint. Prudenter itaque Theopompus, Spartanorum rex, cum primus Spartæ regibus Ephoros adiunxisset, exprobranti vxori, quòd filiis regnum minus, quàm accepisset, relicturus esset: respondit, tanto id maius esse relicturum, quanto firmitus a. & hanc quoque sententiã comprobasse videtur armatus Annibal, cum ad Scipionẽ ait: Optimum fuerat, eam patribus nostris mentem datam a diis esse, vt vos Italia, nos Africæ imperio contenti essemus: ita aliena appetiuimus, vt de nostris dimicaretur b. Cum itaque in omnibus negotiis, vt inquit Cicero c, tum præsertim in bello, priusquã aggrediare, adhibenda est præparatio diligens, & percipienda cogitatione futura: & aliquando antè constituendum, quid accidere possit, in vtramque partem, & quid agendum sit, cum quid euenerit: nec committendum aliquid, vt aliquando dicendum sit, Non putaram: quam Iphicrates turpissimam esse vocẽ imperatoris dicebat d. Et quidem, vt ad secandum & vrendũ medici \*, sic nos ad bella raro inuitiq; veniemus, nec vnquam, nisi necessario, si nulla reperietur alia medicina, exẽplo Augusti: qui ad-

a Plut. ad princip. erud.

b Linius l. 30

c offic. lib. 1.

d Plut. in a. popb.

qui admodū bella omnia execratus est, & nō nisi ex maxima causa vnquam bellum alicui genti indixit. iactantis enim ingenij, & leuissimi esse dicebat, ardore triumphandi, & ob lauream coronam, in discrimen, per incertos euentus certaminum, securitatem ciuium præcipitare. Bellum quoque non suscipiendum, nisi maior emolumentum spes, quàm dāni metus ostendatur. alioqui verò, vt Archidamus Eleos inconsideratè bellum mouentes, monuit, bonum erit quiescere<sup>a</sup>. nam vt idem Augustus dicebat, minima commoda non minimo sectantes discrimine, similes sunt haino aureo piscantibus, cuius abrupti amissi que detrimentū, nullo capturæ lucro pensari potest<sup>b</sup>. quare non erit consultum iis, qui inopes sunt, bellum inferre. Cuius rei exēplo esse potest Sesostris rex Ægypti, qui primum Scythis bellū intulit, missis prius legatis, qui hostibus parēdi legem dicerent. quibus Scythæ responderunt, se mirari tam opulenti populi regē, stolidè aduersus inopes occupare bellum, cū magis domi fuerit illi timendum, quòd belli certamen anceps, præmia victoriæ nulla, damna manifesta essent.

igitur

<sup>a</sup> Plus. in a-  
poph. laco.

<sup>b</sup> Trem. in  
August.

DE IVRE ET OFF. BELL.

igitur non exspectaturos Scythas, ut ad se veniatur: cum tanto sibi in hoste plura concupiscenda sint, utroque prodituros obuiam: quod & fecerunt, & regem in fugam verterunt<sup>a</sup>. Expetenda est itaque magis decernendi ratio, quam decertandi fortitudo: & prius omnia experiri, quam armis certare sapienter decet. quare Spartanorum mos iure laudari potest, qui ante hostium congressum, Amori sacra faciebant: & reges Lacedæmonij, antequam signa inferrent, Musis immolabant, Clementiæ & Amicitia, non Marti: satius ducetes pacatione hostium animos, & pace incruenta conciliare, quam prælij subire aleam. sed ubi tempus, necessitasque postulat, decertandum manu erit, & honestum bellum, ex Demosthenis sententia, semper turpi paci præferendum erit. prudenter quoque Spartana ciuitas, seuerissimis Licurgi legibus obtemperans, aliquandiu civium suorum oculos a contemplanda Asia retraxit, ne illecebris eius capti, ad delictius vitæ genus prolaberentur. quod eos non frustra timuisse dux ipsorum Pausanias satis ostendit: qui magnis rebus gestis, ut primum se Asiæ moribus permisit,

misit, fortitudinem suam effeminato  
 eius cultu, vt ait Valer. Max<sup>a</sup>. emollire a lib. 2, cap. 4  
 non erubuit. Fit itaque plerumque, vt  
 4 plus istiusmodi victoriis amittatur\*, quā  
 quærat, vt eadem Asia testis est: quæ  
 facta Romanorum, cum opibus suis, e-  
 tiam vitia Romam transtulit<sup>b</sup> Est verò b Iustini, l. 36  
 fortis animi, qualē in bello requirimus,  
 secūda moderatè, aduersa fortiter ferre:  
 5 non perturbari in rebus asperis, nec tu-  
 multuantem de gradu deiici, vt dicitur;  
 sed præsentis animi vti consilio: nec a ra-  
 tione discedere, sed in omni fortuna eū-  
 dem animum gerere. & is demū vir erit,  
 vt inquit Liuius, cuius animū nec pro-  
 spera fortuna flatu suo efferet, nec ad-  
 uersa infringet: qualis Camillus descri-  
 3 bitur, cū ait: Nec mihi dictatura ani-  
 3 mos fecit, neque exilium ademit, exstāt-  
 que in hanc rem memorabilia Roma-  
 norum exempla, vt dubium sit, an admi-  
 rabiliores in aduersis, an verò in secūdis  
 rebus Romani fuerint. de quibus fer-  
 6 tur\*, Neque, si vincerentur, animos illis  
 minui solere, neque, si vincerent, secūdis  
 rebus insolescere<sup>c</sup>. Itaque Albino con- c Iustini, l. 31  
 sule, exercitu a Pyrrho cæso, & clade  
 Cannensī accepta, quæ certè grauissima  
 N fuit,

DE IVRE ET OFF. BELL.

fuit, iam tertiū victis ab Annibale: nulla vel minima quidē abiecti animi signa edita: nulla mētio pacis Romæ fuit: quin potius magno animo de bello restaurādo cogitarum, & octo millia captiuorū, quòd per deditionem, & sine pugna, in potestātē Annibalis venissent, cū paruo possent redimi, non placuit. sed octo millia iuuenum validiorum ex seruitiis empta, publicè armata sunt. Hic miles, vt inquit Liuius <sup>a</sup>, magis placuit, cū precio minore redimēdi captiuos copia fieret. Similiter Romanis prælio equestri victis a Perseo Macedonū rege, cū Perseus consilio amicorum, suadētium, vt secunda fortuna in conditione honestæ pacis vteretur potius, quàm spe vana euectus, in casum irreuocabilē se daret, ad P. Licinium cons. legatos misisset: qui pacem iisdem conditionibus peterent, quibus Philippo data erat: summotis arbitris, cū consultarent, vicit Romana constantia in consilio, inquit Liuius <sup>b</sup>: & responderi placuit, ita pacem dari, si de summa rerum liberum senatui permittat rex, de se, de que vniuersa Macedonia statuēdi ius: victi victoribus eas leges, quæ victis præscribi solent, statuētes,

a lib. 22.

b lib. 42.

tes. ita namque tum mos erat, in aduersis vultum secundæ fortunæ gerere: moderari animos in secundis. cui simile est factum Marcelli, qui exercitu suo pridie fuso, fugatoque, postridie grauer increpitis militibus, in acië prodiit: quod cum nunciatum esset Annibali, cum eo nimirum (inquit) hoste res est, qui nec bonam, nec malam fortunam ferre potest: seu vicit, ferociter instat victis; seu victus est, instaurat cum victoribus certamen Marcellus verò magna victoria potitus est<sup>a</sup>. itaq; Pyrrhus, fusis aliquot Romanorum exercitibus, cum videret, eorum qui superessent in reparando exercitu festinatione: Video me (inquit) plane herculis sydere creatum, cui quasi ab angue Lernæo, tot cæsa hostiũ capita de sanguine suo renascuntur<sup>b</sup>. quæ certè animi magnitudo, & constantia Romanorum tantum potuit, vt Pyrrhum, quamuis victorẽ, & magnis copiis auctore eius exercitu, priorem ad pacem petendam cõpulerit. cui, licet æquissimas conditiones pacis petedi, auctore Ap. Claudio cæco respõderi placuit, vti rex Italia excederet: tum, si e re sua videretur, de amicitia ac societate verba faceret. quoad

<sup>a</sup> *Liuius l. 27*

<sup>b</sup> *l. Florus, de gest. Rom. l. 1 cap. 18.*

DE IVRE ET OFF. BELL.

a *Plut. in  
Pyrrho.*

verò in armis esset, populum Rom. ad-  
uersus eum belligeraturum, etiã si mille  
Albinos pugna superasset<sup>a</sup>. Et quidem,  
quemadmodum rebus aduersis, non fa-  
cilè Romanorum animos consternari  
solere superioribus exèplis ostendimus:  
sic nec prosperis insolescere argumento  
sit, quod Scipio Africanus Antiocho  
victo, pacem petenti respondit: Romani  
(inquit) eosdè in omni fortuna animos  
gessimus, gerimusque: neque eos se-  
cundè res extulerunt; neque aduersæ mi-  
nuerunt. eius rei, vt alios omittam, An-  
nibalem vestrum vobis darem testem,  
nisi vos ipsos dare possẽm. postquã Hel-  
lespontum traiecimus, priusquam castra  
regia, priusquam aciem videremus, cùm  
communis Mars, & incertus belli euen-  
tus esset, de pace vobis agentibus, quas  
paribus ferebamus conditiones, easdem  
nunc victores victis ferimus<sup>b</sup>. estq; pro-  
fectò hæc animi æquabilitas, & modera-  
tio, non solùm magno viro digna: (nam  
vt Varro scribit, sapiens & bonum ferre  
debet modicè, & malum fortiter, ac le-  
niter) sed solet etiam plerũque in rebus  
gerendis, maximi esse momenti. ferme  
enim sit, vt secundæ res negligentiam  
creent.

b *Livius l. 37*

creent. qua fiducia L. Marcius extinctis Scipionibus, cum reliquiis exercituum, milites hortatus, bina castra Pœnorum in Hispania, vbi omnia neglecta & soluta inuenit: vna nocte inuasit, & cepit, hostibus cœsis<sup>a</sup> Amyntas, verò cum prælio <sup>a</sup> *Liuii* l. 35 superior, Ægyptios Memphim, quam obsidebat, compulisset, & suos ad populandum agros eduxisset: ab hostibus, eruptione facta, quòd victores palantes & victoriæ fiducia incautos viderent, cum omnibus suis ad interneccionem cœsus est<sup>b</sup>. Prudenter itaque Q. Fabius Max. dicebat, se magis prospero Minucij collegæ, quàm aduerso euentu, aliquid timere mali: nec eum sententia fefellit. nam secundis rebus elatus collega, temerè cum hoste conflixit, & se cum exercitu in euidēs periculum cōiecit: sed a Fabio seruatus fuit<sup>c</sup>. Sic quoque cum <sup>c</sup> *Liuii* l. 22 Terētius Varro cons. homo temerarius, in prohibendis prædatoribus, tumultuario quodam prælio superior fuisset: haud ægrè Annibal id damnū passus est; quin potius credebat, velut inescatam temeritatem ferocis consulis, & novorum militum, vt certè accidit. nam stolidi illorum temeritate, nec quicquam re-

DE IVRE ET OFF. BELL.

Iustate collega L. Emilio Paulo, clades illa Cannensis Romanis illata est. & idem Varro, quemadmodum ante cladem ferox, ita clade accepta humilis, nimirum nudando cladem, Campanorum animos a Romanis auertit<sup>a</sup>. Est itaque viro forti maximè enitendum, non solum ut non frangatur aduersis, sed etiam, ut non extollatur secundis: eoq; magis, quod plerumque melius malam, quam bonam fortunam ferre possumus. vnde Epaminondas, Leuctrica victoria potitus, postridie processit squalidus, & humilis, solitus alias vncto corpore, & vultu sereno videri: inquiring, se, quod animo elatior pridie fuisset, immoderatum illud gaudium castigare<sup>b</sup>. & prudenter Philippus, cum Athenienses, quibus se aliquot ciuitates Græciæ iunxerant, magno prelio vicisset, ita vicit, ut victorem nemo sentiret: & ita inter tacitam læticiam, & dolorem hostium temperauit, ut neque apud suos exultrasse, neq; apud victos insultasse videretur: cum tamè illa victoria Philippo vniuersæ Græciæ imperium dederit<sup>c</sup>. Porrò ad officia bellica, vel maximè spectant duo illa præcepta Platonis<sup>\*</sup>: quæ iis, qui reipubl. præfuturi  
sunt,

<sup>a</sup> *Liuius l. 22  
in fine. C. ub.  
23. in princ.*

<sup>b</sup> *Plut. in a.  
poph.*

<sup>c</sup> *Iustin. l. 9.*

sunt, præscribuntur: vnum, vt vtilitatem ciuium sic tueantur, vt quidquid agant, ad eam referant, obliti commodorum suorum: alterum, vt totum corpus rei publicæ curent: ne dum partem aliquam tuentur, reliquas deserât. vt enim tutela, sic procuratio rei publ. ad vtilitatem eorum, qui commissi sunt, non ad eorum quibus commissâ, gerenda est<sup>a</sup>. Quare <sup>a Cic. offic. lb. 1.</sup> cauendum erit viro forti\*, vt Cicero ait, ne pro sua vtilitate potiùs bella gerat, & periculis sese offerat, quàm pro vtilitate communi. nam animi magnitudo, quæ cernitur in periculis, & laboribus, si iusticia vacat, pugnatque non solum pro salute communi, sed pro suis cõmodis, in vitio est. Siquidem rectè Stoici, fortitudinem virtutem esse dicunt, pugnantem pro æquitate: nihilque honestum esse posse, quod iusticia vacat. Animus itaque paratus ad periculum, vt idem Cicero ait, si sua cupiditate, non vtilitate cõmuni impellitur in pericula: audaciæ potiùs nomen habebit, quam fortitudinis. Vnde Callicatridas Lacedæmoniorum dux, meritò reprehensus: qui classis, quã priuatæ gloriæ iacturam facere maluit: atque item Cleombrotus, qui inui-

DE IVRE ET OFF. BELL.

diam timens, temerè cum Epaminonda  
 conflixit. quãto rectiùs Q. Fabius Max.  
 qui suum imperium minui per vanitatẽ  
 populi maluit, quàm secunda fama malè  
 rem gerere. idem L. Æmilium Paulum,  
 ad bellum contra Annibalem cum C.  
 Teretio Varrone collega, temerario ho-  
 mine, proficiscentem monens, vt sedẽdo  
 cum Annibale bellum gereret, neque  
 temerè cum hoste confligetet : ita allo-  
 cutus est: Resistes autẽ, inquit, aduersus »  
 famam, rumoresque hominum, si satis »  
 firmus steteris: si te, neque collegæ vana »  
 gloria, neque tua falsa fama mouerit. a »  
 veritate laborare, ius sæpe aiunt; extin- »  
 gui nõquam, gloriam qui spreuit, veram »  
 habebit. siue timidum pro cauto: tardũ »  
 pro considerato: imbellem pro perito »  
 belli vocent: omnia audentem contēnet »  
 a *Livy l. 22* Annibal, nihil temerè agẽtem metuet<sup>a</sup>. »  
 Exstat quoque in hanc sententiam præ-  
 clara Lentuli principis viri oratio, Ro-  
 manis ad furcas Caudinas inclusis, & a  
 Samnitibus legatione accepta, non alias  
 condiciones pacis esse, quàm si inermes  
 cum singulis vestimētis sub iugum mit-  
 terentur: in hæc verba: Patrem meum, »  
 inquit, consules, sæpe audiui memoran- »  
 tem,

r tem, se in capitolio vnum non fuisse au-  
 » torē senatui, redimendæ auro a Gallis  
 » ciuitatis, quando nec fossa valloque, ab  
 » ignauissimo ad opera ac muniendū ho-  
 » ste, clausi essent: & erumpere, si non sine  
 » periculo magno, tamen sine certa perni-  
 » cie possent. quod si, vt illis, decurrere ex  
 » capitolio armatis in hostem licuit (quo  
 » sæpe modo obsessi in obsidentes erupe-  
 » runt) ita nobis æquo aut iniquo loco di-  
 » nicandi tantummodo cum hoste copia  
 » esset: non mihi paterni animi indoles in  
 » coniuo dando deesset. Equidem mortē  
 » pro patria præclaram esse fateor, & me  
 » vel deuouere pro populo Rom. legioni-  
 » busque, vel in medios me committere  
 » hostes paratus sum. sed hic patriā video,  
 » hic quicquid Romanar. legionum est:  
 » quasi pro seipsis ad mortē ruere volunt:  
 » quid habent quod morte sua seruent?  
 » recta vrbs, dicat aliquis, & mœnia, & eā  
 » turbā a qua vrbs incolitur. imo hercule  
 » produntur ea magis omnia, deleto hoc  
 » exercitu non seruantur. quis enim illa  
 » tuebitur? imbecillis videlicet & inermis  
 » multitudo? tam hercule, quàm a Gallorū  
 » impetu defendit. an a Veijs exercitum  
 » Camillumque ducem implorabunt? hic

DE IVRE ET OFF. EELL.

omnis spes,opesque sunt:quas seruãdo, »  
 patriam seruamus; dedendo ad necem, »  
 patriam deserimus ac prodimus.at fœda »  
 atque ignominiosa deditio est. sed ea »  
 charitas patriæ est,vt tam ignominia eã, »  
 quàm morte nostra, si opus sit, serue- »  
 mus. subeatur ergo ista, quantacunque »  
 est, indignitas, & pareatur necessitati, »  
 a *Linium 1,9.* quam ne dii quidem superant<sup>a</sup>. Qua- »  
 cunque igitur ratione patriæ & reipub.\* 9  
 consulere debemus,& pro ea defenden-  
 da,nullam infamiam,nec ipsam quoque  
 mortem, si res ita postulat, recusare de-  
 bemus.sed,vt inquit Plato:Si patria mã-  
 darit verberari te,siue in vincula conijci,  
 siue in prælium miserit,ad vulnera acci-  
 pienda, mortemque subeundam: obe-  
 diendum est omnino, & neque tergi-  
 uersandum,neque fugiendum erit,sed &  
 in bello, & in iudicio,& prorsus vbique,  
 ea quæ respub. vel patria iusserit,facien-  
 da sunt. quæcunque enim a nobis ge-  
 runtur,non ad nostram vtilitatem & cõ-  
 modum, sed ad patriæ salutem conferre  
 debemus<sup>b</sup>. mori autem pro patria\*, glo- 10  
 riosissimum semper habitum fuit<sup>c</sup>. itaq;  
 exclamat Cicero<sup>d</sup>: O fortunata mors, »  
 quæ naturę debita,pro patria est potissi- »  
 mùm

<sup>b</sup> Cicero, in  
 Vatin.

<sup>c</sup> l. bello a-  
 missi, D. de  
 excu. tue.

<sup>d</sup> Philipp, 14.

mum reddita. turpissimum verò est, cum possis cum summa virtute & honore, pro patria interire: malle per dedecus & ignauiam viuere<sup>a</sup>. Qui verò pro defensione ecclesiæ moritur, cæleste regnum

» consequitur<sup>b</sup>. eoque spectat, quod Cicerò ait<sup>c</sup>: Illi igitur, quos cæcidistis, etiã ad inferos pœnam parricidij luent: vos verò, qui extremum spiritum in gloria effudistis, piorum estis sedem & locum consecuti. & quidem Cimbrorũ antiqui milites, adeo gloriosum duxerunt pro repub. mori: vt non existimarent, nisi in bello morerentur, se felices, quasi ad finem vitæ non perseuerãtes. vnde in acie gaudio exultabant, tanquam gloriosè, & feliciter vita excessuri, lamentabantur in morbo, quasi turpiter, & miserabiliter perituri<sup>d</sup>. Itaque non statim mortalis

» criminis damnandi<sup>e</sup> sunt duces belli, vel milites, qui vt victoria potiãtur, se maximo committunt prælij & conflictus periculo, ex quo certior est mors, quàm euasio. nam, vt inquit D. August.<sup>e</sup> Non culpatur in bello, quòd moriantur quãdoque morituri, hoc enim reprehẽdere, est magis timidorum, quàm religiosorũ. quãuis enim nulli liceat sibi ipsi mortem conscif-

<sup>a</sup> Auctor ad Her. lib. 4.

<sup>b</sup> c. omni timore. 23. q. 8. cap. omnibus. 23. q. 5. & Hisp. reg. 1. 3. 12. 25. par. 2. c. Philop. 14.

<sup>d</sup> Val. Man. lib. 2. cap. 6.

<sup>e</sup> lib. 22. contra Faust. Man. c. quid culpatur, 23. q. 1.

DE IVRE ET OFF. BELL.

consciscere: (quo casu mortale crimen  
 a) licet tamen, ex iusta causa,  
 veluti pro patrię, aut Catholicę ecclesię  
 defensione, se mortis vel maximo peri-  
 culo obijcere. itaq̃ue Eleazarum, virum  
 fortissimum, a peccato defendit, & lau-  
 dibus effert Ambrosius<sup>b</sup>: qui superemi-  
 nentem ceteris elephantem, lorica ve-  
 stitum regia, arbitratus quòd in eo rex  
 esset, interfecit, & a cadente bestia op-  
 pressus est<sup>c</sup>. Pro patrię quoque salute<sup>12</sup>,  
 si quis patrem occiderit, vel filium, non  
 solum sine scelere erit, sed etiam p̃mio  
 afficiendus<sup>d</sup>. quod ita verum puto, si res  
 omnino ad perniciem patrię spectabit,  
 neque filius monendo, neque minitãdo  
 quicquam profecerit, vt patrem ab in-  
 stituto auerteret. patrię enim salutem  
 anteponet saluti patris, ex frequētissima  
 Philosophorum sententia<sup>e</sup>. quod etiam  
 iure probatur<sup>f</sup>: quicquid dicat Bodi-  
 nus<sup>g</sup>: qui contrarium sensit, & temerè  
 reprehendit iuris interpretes. Præclarè  
 etiam Fulvium senatoris filium, ad Ca-  
 tilinam proficiscētem, retractum ex iti-  
 nere iussit parens necari<sup>h</sup>. qui verò pa-  
 triã prodit, criminis læsę maiestatis reus  
 est<sup>i</sup>. Ceterum, quod ad secundum Pla-  
 tonis

<sup>a</sup> c. non licet.  
 23. qu. 2. D.  
 Aug. de civit.  
 Dei l. 1. c. 20  
 & 21.

<sup>b</sup> de offic. l. 1.  
 cap. 40.

<sup>c</sup> Machab. 1.  
 cap. 6.

<sup>d</sup> l. minime.  
 de relig. &  
 sumptib. su-  
 ner.

<sup>e</sup> Cicero, off.  
 lib. 3.

<sup>f</sup> in l. veluti.  
 D. de iust. &  
 iur. l. advoca-  
 ti. C. de adu-  
 diuer. iudicio.  
 & d. l. mini-  
 me. Borradius

in additione,  
 ad Terraru-  
 beam. tract. 3  
 art. 3 faciunt

tradita a C'a  
 ro in §-feudū  
 q. 21. nu. 4.

<sup>g</sup> de republ.  
 l. 1. cap. 4.

<sup>h</sup> Salustius  
 in cõiu Catil.  
 i l. 1 & 2 D.  
 ad l. Iul. Mar.

tonis præceptum attinet: illud maximè  
cauendum, ne, dum singulas partes tueri  
volumus, totum corpus reipub. in peri-  
culum trahamus. Quare in bello nō te-  
13 merè suscipienda\* est defensio sociarum  
vrbiū, aliorumque oppidorum, quæ cō-  
modè defendi non possunt: præstatque  
illa deserta hostibus relinquere, quàm  
nec quicquā defendēdo, de summa rerū  
in discrimē venire, aut etiā famæ pericu-  
lum facere: quæ plerunque latius, infla-  
tiusque, quàm res est, percrebrescere solet,  
& sæpe ad vniuersi belli euentū, maximi  
esse momenti, itaque famam bellū gerere  
aiunt, & parua momēta, in spē, metumque  
impellere animos. Qua de causa Philip-  
pus Macedonū rex, a Romanis prælio vi-  
ctus, vrbes socias, aliaque oppida, quæ de-  
fendere nō poterat, incendit ac vastauit:  
homines, qui sequi possent, exciuit: rerū  
suarū, quas possent, ferendarum secū do-  
minisius fiebat: cetera militis præda e-  
rat. quæ quidē faciēti Philippo acerba e-  
rāt, sed e terra mox futura hostiū, corpo-  
ra saltē eripere volebat<sup>a</sup>. in quo Sueuo-  
rum morē imitatus videtur, qui cū bellū  
ipsis inferretur, cōsilio habito, nūcios in  
omnes partes dimittebāt, vti de oppidis  
demi-

<sup>a</sup> Livius l. 32<sup>a</sup>

DE IVRE ET OFF. BELL.

demigrarent: liberos, vxores, suaq; omnia in siluas deponerent: atque omnes, qui arma ferre possent, in vnum locum conuenirent <sup>a</sup>. Simili ratione Versingetorix, nouis rebus studens, & Gallos ad defectionem a Romanis sollicitans, Bitorigibus persuasit, vt oppida incenderent, quæ non munitione, & loci natura ab omni essent periculo tuta: ne suis essent ad detrectandam militiam receptacula: neque Romanis proposita ad copiam commeatus, prædamque tollendam <sup>b</sup>. Cauendum tamen omnino erit, ne quid horum crudeliter, aut auaritiæ causa fiat. nam cum Annibal, quod neq; omnes Italiæ populos, qui se illi coniunxerant, tenere præfidiis, nisi vellet in multas paruasque partes carpere exercitum, quod minimè tum expediebat, posset: neque, deductis præfidiis, spei liberam, vel obnoxiam timoris sociorum relinquere fidem: præceps in auaritiam, & crudelitatem ad spolianda, quæ tueri nequibat, inclinasset: quam foedum id consilium esset, inquit Liuius <sup>c</sup>, exitus docuit. non enim indigna patientium modò abalienabantur animi, sed ceterorum etiam: quippe ad plures exemplum,

<sup>a</sup> *Cæs. de bel. gall. lib. 4.*

<sup>b</sup> *Cæs. de bello Gall. lib. 7.*

<sup>c</sup> *lib. 26.*

plum,quàm calamitas pertinebat. Cōsultius verò Romani, qui accepta Can-nensi clade, & circumspectis omnibus imperij sui viribus, lōginquis sociis præsidium implorantibus, non quidem miserunt, quòd vires non suppeterent, sed cōsulere sibi seipsos iusserunt: nihil crudele in illos exercentes<sup>a</sup>. Solerter verò <sup>a Livius l. 23</sup> M. Porcius Cato cons. in Hispania bellū gerens, cū legati ab Ilergetum regulo Biligaste ad eum venirent, querentes castella sua oppugnari, nec spem vllam esse resistendi, nisi præsidio Romanus miles esset, & consulem anceps cura agitaret: nolle deferere socios: nolle minuere exercitum: quod aut moram sibi ad dimicandum, aut in dimicando periculum afferre posset, & statuisset non minuere exercitum, ne interim hostes quid inferrent ignominia: sociis spem pro re ostēdendam censuit: sæpe vana pro veris maximè in bello valuisse: & credentem se aliquid auxiliij habere, perinde atq; haberet: ipsa fiducia, & sperando, & audendo servatum. Itaque legatis respondit, quanquam vereretur, ne suas vires, aliis eas commodando, minueret: tamen illorum, tēporis, & periculi, magis quàm sui

DE IVRE ET OFF. BELL.

fui, rationem habere: & denunciari militū parti tertiæ ex omnibus cohortibus iubet, vt cibum, quem in naues imponant, maturè coquāt, nauesque in diem tertium expediri præcepit, legati non antè profecti, quàm impositos in naues milites viderunt, id pro haud dubio iam nunciantes, non suos modò, sed etiã hostes, fama Romani auxiliij aduentantis impleuerunt. consul verò, vbi satis quod in speciem fuit, ostentatū esset, reuocari ex nauibus milites iussit. qua ratione sociis, spe auxiliij, ad obsidionem ferendam animum dedit, hostemque ab obsidione deterruit: & ipse integris viribus ad hostem profectus, præclara victoria potitus est. Porro quemadmodū non est suscipienda temerè defensio\* eorū, quæ tueri non potes: sic nec facilè deferenda sunt, quæ hostium impetum excipere & frangere possunt. in quo Antiochus turpiter lapsus fuit, qui prælio nauali a Romanis victus, quia possessione maris pulsus, longinqua tueri diffidebat se posse: præfidiū ab Lyfimachia, ne opprimeretur ibi a Romanis, deduci prauo, vt res ipsa postea docuit, cōsilio iussit. non enim tueri solūm Lyfimachiã a primo impetu Romanorum

lib. Linius l. 34

14

manorum facile erat, sed obsidionem etiam per totam hiemem tolerare, & ob-  
 dentes quoque ad ultimam inopiã ad-  
 ducere, extrahendo tempus <sup>a</sup>. Inter ce- <sup>a</sup> *Lincol. 37*  
 tera denique officia bellica refert Cice- <sup>b</sup> *Appia, de bel.*  
 ro <sup>b</sup>, ne sæuiatur \* supra modũ in victos. <sup>Syr.</sup>  
 cùm nihil laudabilius sit, nihil magno & <sup>b</sup> *offic. lib. 1.*  
 præclaro viro dignius placabilitate, &  
 clementia, &

*Parcere de victis, & debellare superbos.*

Parcendum itaque multitudini, & ij qui  
 in imperatorum fidem cõfugiunt (quã-  
 vis murum aries percusserit, vt inquit  
 Cicero) recipiendi, & auctores tantũ  
 turbarũ puniendi. nam, vt inquit auctor  
 ad Heren <sup>c</sup>. viri fortis est, quide victoria <sup>c</sup> *lib. 4.*  
 contendunt, eos hostes putare; qui victi  
 sunt, eos homines iudicare: vt possit bel-  
 lum fortitudo minuere; pacem humani-  
 tas augere. De euertendis autem, diri-  
 piendisq̃ue vrbibus valde illud confide-  
 randum monet Cicero, ne quid temerẽ,  
 ne quid crudeliter fiat. Itaque M. Mar-  
 cellus maximam cõsecutus est laudem:  
 qui antequam Syracasas vrbem opulẽ-  
 tissimam, prædæ pro concione militibus <sup>d</sup> *refert L.*  
 ediceret, fleuit, edictoq̃ue cavit, ne quis <sup>August. de ci-</sup>  
 corpus liberum violaret <sup>uit. Dei lib. 14</sup> <sup>cap. 6,</sup> & Scipio, qui

○ capta

DE IVRE ET OFF. BELL.

capta Carthagine, quæ repleta erat stautis, donariisque Græcanicis, ex Sicilia aduectis, edixit, vt e singulis vrbibus venirent, qui dinoscerent, suaque auferrēt: & nihil quicquam suorum quemquam passus est, vel liberum, vel seruū de præda accipere, nec emere quidem, aliis direptioni vacantibus<sup>a</sup>. C. Cæsar quoque dicere solet, nihil sibi gratius esse, quàm multitudini parcere: isque Trebonio legato, Massiliam oppugnanti, per litteras magnopere mandauit, ne per vim oppidum expugnari pateretur: ne grauius permoti milites, & defectionis odio, & cõtemptione sui, & diutino labore, omnes puberes interficerent: quod se facturos minitabantur<sup>b</sup>. Est itaque clemētia, non solùm magno viro digna, sed solet etiam plerumque esse fructuosa, & gloriosa. quò spectat illud Philippi patris Alexand. Magni, qui suadētibus quibusdam, vt acerbè in Athenienses statueret: absurdè eos sentire dixit, qui tot, tantaq; gloriæ causa agentem, ac tolerantem, iuberent gloriæ theatrum euertere<sup>c</sup>. Spartani quoque, cùm Athenienses ad dedicationem compulissent, & quidem censerent, infestissimam vrbem, cum ipso nomine

<sup>a</sup> Plut. in a-  
popht.

<sup>b</sup> Cæsar de  
bel. ciuil. lib. 2

<sup>c</sup> Plut. in a-  
popht.

mine abolendam: negarunt se permissuros, vt e duobus Græciæ oculis, vnus erueretur <sup>a</sup>. & Macedonum reges acie debellare solitos scribit Liuius <sup>b</sup>; vrbibus parcere, quantum possent: quo opulentius imperium haberēt. nam de quorum possessione dimicaretur, tollentē nihil sibi præter bellum relinquere, quod consiliū esse? Itaque tertium Romuli institutum fuisse scribit Dionysius Halicarnassens <sup>c</sup>, ne captas bello vrbes funditus euertent: sed bellorū ius esse scribit Liuius <sup>d</sup>, vt victi victoribus cum bona pace dominantur, & imperent. Non alienum videtur, prudētem admonitionem Belisarij, qua Totilam a diruenda Roma auertit, hic subijcere. cū enim Totila urbem victor ingressus, eam omnino solo æquare constituisset: monuit eum Belisarius per literas, ne quid temerè faceret, nam, inquit, alterū e duobus necessariò eueniet: aut victus in hoc bello succumbes; aut annuente fortuna superabis. si victor euaseris, Romamque deleueris, nō alienam, sed tuam perdidideris; si seruaueris, regiam certè omnium pulcherrimam, atque ditissimam seruaueris: si verò a nobis deuictus fueris, seruata vr-

<sup>a</sup> Paul. Oros.  
lib. 2. cap. 17.  
<sup>b</sup> ub. 31.

<sup>c</sup> ant. Rom. 4  
lib. 2.

<sup>d</sup> lib. 1.

DE IVRE ET OFF. BELL.

be, atque incolumi, gratias immortales a victore expectare debes; sed ea diruta, nulla humanitate contra te agetur. & his literis motus Totila a diruenda vrbe destitit<sup>a</sup>. Simili dilemmate, principis Arausini efferatum animum emolliuerunt nonnulli præstantes viri huius Academiæ Louaniensis: cùm enim in expeditione illa nefanda contra patriam, anno salutis CIO, IO. LXXII, ciuitatem Louaniensem destitutam præsidio, cum validissimo exercitu oppugnaret, & videret viri prudentissimi, se vim hostium ferre non posse: quamuis turpe esset pacisci cum nefario, & iniusto hoste, ne tamen videret diuina, humanaque omnia violari: templa profanari: academiam lōgè præstantissimam deuastari a scelestissimis hostibus: maluerunt necessitati cedentes, hæc omnia oblato certo pecuniæ precio redimere, quam crudelitatem hostis experiri. cumque ille non contentus redemptionis precio, eò impudentiæ venisset, vt etiam iusiurandum, quod citra crimen læsæ maiestatis illi præstari non poterat. a ciuibus Louaniensibus exigeret: iidem illi viri, qui mori maluissent, quàm tãto scelere se adstringere hac ratione

*a refert Petr. Crutu, de honesta disciplina. lib. 5. ex Prucopio.*

tione hostis impudentiam represserūt, dicentes: Aut in hoc prælio, quod tibi restat cum regio exercitu, cui Dux Albanus præerat, vinces; aut vinceris: si vinceris, nihil certè negotij tibi erit nobiscum: qui velimus, nolimus, in tua potestate erimus. sin verò victus fueris, (vt dubia est fortuna belli) non est cur velis nos indignationem incurrere, & Regis, & Ducis Albani, atque ita Regis maiestate illæsa, & pactione necessaria, neque turpi, maxima prudentia reipubl. consulerunt. Est tamen ita probanda māsuetudo, atque clemētia, vt adhibeatur reipub. causā seueritas, præsertim si sic omnino reipubl. conueniat. qua de causa Romani Numantiam & Carthaginem funditus sustulerunt: quamuis Scipio Nasica pontifex max. nolebat æmulam imperij Romani Carthaginem dirui, & decernenti vt dirueretur, contradicebat Catoni, timens infirmis animis hostem securitatem, &, tāquam pupillis ciuibus idoneum tutorem, necessarium videns esse timorem: nec eum sentētia fefellit.

ex eo enim tempore cœpit Romana ciuitas otio & luxu diffluere. qua de re pulchrè D. August<sup>a</sup>. & Samuel quoque

*a de ciuit. Dei  
lib. 1 cap. 29  
Appian. de  
bell. punic.*

DE IVRE ET OFF. BELL.

satis ostendit populo, Deū excitasse ho-  
stes contra Israēlitas, vt eos in officio  
contineret<sup>a</sup>. solent enim homines, cūm  
ad externa bella supersunt vires, iis abu-  
ti, inter semetipsos certando: quæ bella  
longè exitiosissima sunt. Præclarè itaque  
Spartani, qui, cūm rex ipforum pollice-  
retur, se deleturum urbem, quæ illis ne-  
gotium exhibuerat, non permiserunt,  
inquiētes: Noli delere cotem virtutis<sup>b</sup>.  
Porrò tempore belli, si sic reipubl. expe-  
diat, non solūm hostium, sed etiam ci-  
uium ædes, ad moenia cōstitutæ, ex qui-  
bus incendiū, vel insidiæ timeri possunt,  
prosterni ac dirui posse, etiam nullo so-  
luto precio, legibus statutum est.<sup>c</sup>

<sup>a</sup> Regum 1.  
cap. 12. et lu-  
dith c. 2. 3. &  
4.

<sup>b</sup> Plut. in a-  
poph.

<sup>c</sup> l. ficuti. C.  
de ædific. pri-  
uat. l. adifi-  
cia. C. de o-  
per. public.

DE IMPERATORE VEL DVCE  
EXERCITVS.

- 1 Nihil rarius perfectō imperatore.
- 2 Imperatoris nomen quibus commune.
- 3 Præstat habere bonum ducem, quàm bo-  
nos milites.
- 4 Qua aetate eligendi duces.
- 5 Leges annales Romanorum.
- 6 Quatuor in imperatore requiri.
- 7 Virtutes imperatoris.
- 8 Imperator non temerè cum hoste cōstiget.

- 9 *Præstat ingenio superare quàm gladio.*
- 10 *Cautus imperator præferendus audaci.*
- 11 *Hostis refrumentaria prohibendus.*
- 12 *Abinceptis non facile discedendum.*
- 13 *Constãtia & fiducia imperatoris in bello.*
- 14 *Militum animi ante conflictum variis modis confirmandi.*
- 15 *Exercitus incommoda tegenda.*
- 16 *Optimus imperator qui maximè cognitas habet res hostium.*
- 17 *Non temerè transfugis credendum.*
- 18 *Imperator ad omnia aspera se ducem præbeat.*
- 19 *Imperator cautè versari debet in periculis.*
- 20 *Consilium Antigoni.*
- 21 *Non solum bellandi virtus, sed etiam alia virtutes querenda in imperatore.*
- 22 *Imperatori liberum arbitrium permitendum.*
- 23 *Carthaginenses asperi in duces belli.*

## CAPVT SECVNDVM.

**S**I bellum gerendum est, in primis certè videndum, quem exercitui præficiamus, tanti enim esse exercitum, quàm imperatorem verè proditum est: nihilq; rarius inueniri posse perfecto imperatore\*. quod nomè olim commune erat

DE IVRE ET OFF. BELL.

uis, qui exercitui \* ad certum tēpus præ-  
 essent: quamuis postea Cæsar, quem alij  
 secuti sunt, summum principatum ade-  
 ptus, perpetuum imperatoris nomen  
 sumpserit<sup>a</sup>. Itaque Philippus Macedo  
 admirari se aiebat, quòd Atheniēses sin-  
 gulis annis novos imperatores eligerēt:  
 cū ipse in omni vita, non nisi vnum  
 ducem bonum Permeniona inuenisset.  
 & idem dicebat, præstatiorem esse exer-  
 citum \* ceruorū imperante leone, quàm  
 3 leonum ducce ceruo. atque ita C. Cæsar,  
 cū iret in Hispaniam cōtra Petreium,  
 dicebat se non magni eum facere, quòd  
 iret ad exercitum sine duce. & C. Fabri-  
 cius, cū audiret Romanos a Pyrrho  
 victos: non (inquit) Epirotæ Romanos,  
 sed Pyrrhus vicit<sup>b</sup>. Et certè exemplo  
 Marcij Coriolani satis apparet, ducibus  
 superiorem, quàm exercitu rem Roma-  
 nam fuisse, inquit Liuius<sup>c</sup>. Volsci enim,  
 semper antea victi, à Romanis; Coriola-  
 no duce, victores exstiterunt. Hinc Epicra-  
 tes de re militari differens, ait exercitum  
 esse, quasi quoddā animal homini persi-  
 mile, cuius caput sit imperator: acies in-  
 structa, pectus, ac thorax: pedites, ma-  
 nus: equites autem, pedes: & sicut in  
 corpore

<sup>a</sup> Appian, in  
 proem. Rom.  
 hist. Tacitus  
 ann. lib. 3.

<sup>b</sup> Plut. in a.  
 poph.

<sup>c</sup> lib. 2.

corpore conturbato, commotoque capite, membra reliqua nullum officium præstare possunt: sic perturbato imperatore, exercitus omnis fluctuet, periclitetur, ac pereat necesse est. Et, mortuo Alexandro, exercitum eius vagantem, & in seipsum impingentem, Leosthenes similem dixit Ciclopi esse: qui amisso oculo, vsquequaque manus intendebat, nullum ad certum scopum directus: ita sublato duce, magnitudinem exercitus incertis motibus agitari: atque adeo sicut anima deferente, cadavera non subsistunt, non cohærent, sed dissipantur, & dissoluuntur: ita exercitum Alexandri, eo mortuo palpitare, concuti, atque æstare<sup>a</sup>. Et quidem, quo difficilius bellum instat, eo maiori cura elaborandum est, ut superiorem; sin minus, parem imperatorem hostium duci quæramus. nam, quilibet nautarum, vectorumque, ut Q. Fabius dicebat, tranquillo mari gubernare potest: ubi sæua orta tempestas est, ac turbato mari rapitur vëto navis, tum viro & gubernatore opus est<sup>b</sup>. Quare

<sup>a</sup> Plus de for-  
issud. 9. 107.  
in Alexand.  
oratio, 2.

<sup>b</sup> Livium 2. 24

4 Plato ante trigessimum ætatis annum\*, neminem militiæ præficiendum statuit: etiam si spectatæ virtutis esset, & aliqua

DE IVRE ET OFF. BELL.

militari gloria illustris. Hanc ætatē legitimā bellicis muneribus arbitrati quoque sunt Athenienses: tametsi huic legi aliquando derogatū sit: & præcipuè Alcibiadis gratia, qui adeò gratus fuit populo in adolescētia, vt omnium ciu. um oculos, quoties in publicum prodiret, in se conuerteret: nemoque ei par Athenis censeretur. is ante ætatem bello Syracusano præfectus fuit: cui tamen duo longè maiores natu collegæ dati sunt, Nicias & Lyfimachus, vt tutius reipubl. consuleret. Romani verò etiā suas leges annales\* habuere, quibus grandior ætas 5 (quòd adolescentiæ temeritatem vererentur) ad consulatum, aliosque magistratus constituta fuit. veteres tamen illos admodum antiquos leges annales non habuisse dicit Cicero<sup>a</sup>: quas multis post annis attulit ambitio, vt gradus esset petitionis inter æquales, quo factum est, vt idem Cicero ait, vt sepe magna indoles virtutis, priusquā reipub. prodesse potuisset, extincta sit. At antiqui illi, ab excellēti eximiaque virtute progressum ætatis exspectari non debere existimantes, nulla ætatis, nec generis quoque, aut conditionis cuiusquam ratione habita:  
sed

a Philipp. 5.

sed virtutis cuiusque veri æstimatores:  
 vt quisque maximè virtute excellit, ita  
 quemque ad honores prouexerunt: vt  
 constat ex Dionysio <sup>a</sup>. Et quidem, vt ait <sup>a ant. Romæ  
lib. 6.</sup>  
 Cicero <sup>b</sup>, Rulli, Decij, Coruini, multiq; <sup>b Philop. 5.</sup>  
 alij: recentiore autè memoria superior  
 Aphricanus, T. Flaminius, admodum a-  
 dolescentes, consules facti, rãtas res gef-  
 serunt, vt populi Romani imperium au-  
 xerint, nomen ornauerint. Alexander  
 verò Magnus, cùm ab ineunte ætate res  
 maximas gerere cœpisset, nonne tertio  
 & trigesimo anno mortem obiit? quæ  
 est ætas Romanis legibus decem annis  
 minor, quàm consularis. ex quo, vt idem  
 ait, iudicari potest, virtutis esse, quã æta-  
 tis cursum celeriozem. Valerius porrò  
 Coruinus, vigesimo tertio ætatis anno  
 consul creatus, dicebat consulatum esse  
 præmium virtutis, non sanguinis. & L.  
 Quintius Cincinnatus, pauper admo-  
 dum, quattuor tantùm iugerum agrum  
 possidens, eundemque suis manibus co-  
 lens, ab aratro ad dictaturam capeffendã  
 Romã accersitus est: qui vnica spes po-  
 puli Rom. fuit. quod operę precium esse  
 audire dicit Liuius <sup>c</sup>, iis, qui omnia præ <sup>c lib. 3.</sup>  
 diuitiis humana spernunt: neq; honori  
 magno

DE IVRE ET OFF. BELL.

magno locum, neque virtuti putāt esse, nisi vbi effusè affluant opes. Attilium quoque, qui ad eum accersendum a senatu missi erant, ad imperium populū Romani suscipiendum, semina spargentem viderunt: sed illæ rustico opere attritæ manus, salutem publicam stabilierunt, & ingentes hostium copias pessum dederūt<sup>a</sup>. Porro in summo imperatore<sup>x</sup> quattuor has res esse oportere, existimat Cicerob<sup>b</sup>: scientiā rei militaris, virtutem, auctoritatem, & felicitatem: virtutes autem imperatoris<sup>x</sup> præcipuas has esse: laborem in negotiis, fortitudinem in periculis, industriam in agendo, celeritatem in conficiendo, consiliū in providendo, nihil tamen quicquam magna laude dignum, sine vsu, & exercitatione consequetur, nam quemadmodum in ceteris artibus, sic quoque in arte imperatoria tria spectantur: natura, doctrina, & vsus. natura ingenio, doctrina scientia, vsus fructu diiudicandus est. Ceterum cum nusquam minus, quàm in bello euentus respondeant: ideoque maximæ cuique fortunę minimè credendum sit, vt Annibal Scipioni dicebat: omnino cauēdum erit imperatori, ne temerè cum

<sup>a</sup> Vale. Max.  
lib. 4. cap. 4.

<sup>b</sup> pro lege  
Mamil.

8 cum hoste configat\*, & aleam belli subeat, sed cauta potius cum ratione, quàm prospera ex casu sequatur: & eum ratio ducat, non fortuna, quæ fallax est, & parvis momentis magnas rerum commutationes efficit. Itaq; Cæsarem legimus, extremo vitæ tempore cunctatorem ad dimicandum factum: quo sæpius vicisset, hoc minus experiēdos casus existimās: neque se tantum acquisiturum victoria, quantum auferre calamitas posset<sup>s</sup>. Et a Suetone. lib. 7. de vita C. Cæsaris. quidē sicut felicitas rerum gestarum, ut inquit Cæsar, exercitus benevolētiā: sicut res aduersæ, odia conciliant. quare consultius, tutius, & gloriosius quoque

9 erit imperatori, ubicunq; poterit, ingenio & ratione hostē superare, ex Periculis sententia, quàm gladio. ut enim multo maiora sunt opera animi, quàm corporis, ut ait Cicero; sicæ res, quas profequimur ingenio, gratiores sunt, quàm illæ quas viribus. q̄ etiā significasse videtur Lacedæmonij: apud quos dux, q̄ fortiter dimicasset, & cruēto Marte, magna que hostium clade vicisset, trophæi loco gallū: qui verò deditione, & pacto, industria sua, nec nimis cruēta victoriā potitus, belli mala vitasset, bouē immolabat.

Dion

DE IVRE ET OFF. BELL.

Dion quoq; in libris suis, quide regno  
in scribuntur, dicit longè maiora geri  
paucorum consilio, quàm multitudine,  
aut viribus. quod etiã Homerus indicat,  
cùm Agamemnonem inducit asserentē,  
se longè facilius posse rem Troianam e-  
uertere, si decem Nestores, aut Vlisses in  
cōsilio haberet, quàm si totidem Aiaces,  
& Achilles fortiter dimicantes. quò spe-  
ctant illa verba Vlissis ad Aiace, apud

2 Metamor-  
13.

Ovidium: a

(cundi:

*Quippe manu fortes, nec sunt tibi Marte se-  
Consiliis cessere meis tibi dexterabello  
Vtilis: ingenium est quod eget moderamine nostro.  
Tu vires sine mente geris, mihi cura futuri est:  
Tu pugnare potes; pugnandi tempora mecum  
Elegit Atrides: tu tantum corpore prodes;  
Nos animo: quantoque ratum qui temperat, anteit  
Remigis officium: quanto est dux milite maior:  
Tantum ego te supero: nec non in corpore nostro  
Pectora sunt potiora manu: vigor omnis in illis.  
Et cetera, quæ carmine prosequitur O-  
vidius: ubi dicit arma Achillis, de qui-  
bus cum Aiace contēdebat Vlisses, quæ-  
que digniori erant proposita, in præmiū  
Vlissi tributa fuisse. non itaque tantum  
in viribus corporis, & lacertis fortitudi-  
nis gloria est: sed magis in virtute animi,  
vt in-*

LIBER SECVNDVS. IIO

vt inquit Ambrosius<sup>a</sup>. Vnde quoque gi- a de off. l. 1.  
 gantes, de quibus in sacris litteris, quā-  
 uis viribus & corpore præstarent: quo-  
 niam non habuerunt sapientiam, perie-  
 runt propter suam insipientiam<sup>b</sup>. b Baruch c. 3  
 verò de viro sapiente scriptum est: Sur-  
 rexit filius sensatus, & propter illum de-  
 ,, iecit omnem potentiam inimicorum<sup>c</sup>. c Eccles. c. 47  
 ,, Cautus ergo imperator, & prudens, ex  
 IO Euripidis sententia, audaci & temerario  
 præferendus est. consilio enim sapienti,  
 vt idem dicebat, magna militum manus  
 vinci potest. sic Xerxes, qui tot hominū  
 millia contra Græcos duxerat, vnus  
 Themistoclis industria superatus fuit.  
 Quare Aristides dicebat, non armis so-  
 lum contra hostes, sed consilio in primis  
 vtendū esse. nam cum consilio, & indu-  
 stria superiores euadere possumus, quid  
 opus est pericula suscipere? Hinc rei mi-  
 litaris periti, in eo præcipuam impera-  
 II toris laudem constituunt\*, si ea ratione  
 bellū gerat, qua ipse, & exercitus, quam  
 commodissimè re frumentaria, aqua, li-  
 gno, pabulo vtatur; hostis verò iis om-  
 nibus prohibeatur: & inopia, si fieri po-  
 test, ad deditionem compellatur: & vt  
 maximè se tutò dimicāre posse existi-  
 met,

DE IVRE ET OFF. BELL.

met, tamé tutius arbitretur, obsessis viis, cōmeatu intercluso, sine vulnere victoria potiri. quæ ratio Iulio Cæsari, summo imperatori maximè probabatur: cui erat propositum, vt non nisi coactus prælium committeret cum Afranio, & Petreio, Pompeianarum partium, nam in eam spem venerat, se sine pugna, & sine vulnere suorum, rem cōficere posse: quòd re frumentaria aduersarios interclusisset: cur etiã secundo prælio aliquos ex suis amitteret, secum pensitans: cur vulnerari pateretur optimè meritos de se milites: cur denique fortunam periclitaretur: præsertim cùm non minùs esset imperatoris consilio superare, quàm gladio. & tãdem omnium rerum inopia coactos aduersarios, ad deditionem cōpulit<sup>a</sup>. & hac ratione facile fuisset Pompeio, Cæsarem ad Pharsalum egestate omnium rerum opprimere, vt proposuerat: nisi a suis Dirachina victoria elatis, se a proposito dimoueri passus fuisset<sup>b</sup>. Fabius autem Max. ex hoc genere belli gerendi, summam laudem meruit, etiã ipsius hostis Annibalis testimonio, qui dicebat, se magis a non pugnante Fabio; quàm a pugnante Marcello timere:

<sup>a</sup> Cæs. de bel. mil. lib. 1.

<sup>b</sup> Appian. de bel. civil. lib. 2.

mere<sup>a</sup>: nec eum sententia fefellit. nam Fabius suis artibus eò iam Annibalem sedendo redegerat, ut non solum nihil ex raptis in diem cõmeatibus superaret, sed ne vnde raperet quidem, quicquam reliqui esset; omni vndique frumento, posteaquam ager parum tutus erat, in vrbes munitas conuecto, ut vix decem dierum, quod compertum postea est, frumentum superesset, Hispanorum ob inopiam transitio parata fuerit, si maturitas temporum expectata fuisset: quam Terentius Varro cons. sua temeritate impediuit: cuius aduentu Annibal, in hisce difficultatibus constitutus, quavis parte dimidia auctas hostium copias cernebat, mirè gaudebat, sperans, id quod accidit, fortunam præpostero ingenio & temeritati consulis materiam daturam: cuius culpa ingens illa clades Cannensis Romanis illata fuit <sup>a</sup>. hoc quoque consilio a *Linium l. 22* C. Sulpitio dictatori aduersus Gallos, nequiquam placebat, quando nulla cogeret res, fortunæ se cõmittere, aduersus hostem, quem tempus deteriorè in dies, & locus alienus faceret, sine præparato comœatu, sine firmo munimento morantè: ad hoc iis animis corporibusque,

P quorum

DE IVRE ET OFF. BELL.

a *Livius l. 7.* quorum omnis in impetu vis esset: parua eadem languescere mora. Alexâder verò cùm Leucadiam obsideret, passus est ex finitimis locis omnes eò confugere, vt citius alimenta, quæ habebât, consumerentur: quibus cõsumptis, facilem victoriam consecutus est. & Antigonus vastatis Atheniensium agris, sementis tempore decessit, & quod reliquum habebant frumenti, in sationes sparsa, reuersus nouo vere adultam segetem protriuit, & ad famem redactos Athenienses, in suam volûtatem pertraxit. Vnde præcepti Cãbyfis meminisse debemus, quo Cyrum filium monuit, nunquam exspectandam esse egestatem, & in rerû copia, maximè de inopia cogitandum. sapius enim videmus exercitum consumi penuria, quàm pugna: & vt ait Vegetius, ferro sæuior est fames. Itaq; vt diximus, hisce artibus præcipuè superandi sunt hostes, neque temerè in acie versandû, nisi vbi tempus necessitasque postulat: exemplo Scipionis, qui in Numantinos missus, cùm vidisset coniunctâ cum insania hostium temeritatem, dicebat se tempore redimere hostium temeritatẽ, & quod loco sapientiæ est, alienâ operiri  
stulti-

stultitiam. bonum enim imperatorem, itidem vt medicum, ad malum curandū vltimo demum loco ferrū adhibere debere: nihilominus tamen suo tempore adortus Numantinos fudit<sup>a</sup>. His ascribi posse videtur consilium Sertorij, qui proscriptione Syllana dux Lusitanorū fieri coactus, cū eos oratione flectere non posset, ne cum vniuersa Romanorum acie confligerent: duos in cōspectu eorum constituit equos: alterum validissimum, alterum infirmissimum: ac deinde validi caudā ab imbecillo sene paulatim carpi: infirmi a iuvene eximiarum virium vniuersam conuelli iussit: subiiciens, equi caudæ consimilem esse Romanorum exercitū, cuius partes aliquis aggrediēs opprimere possit; vniuersum conatus prosternere, celerius tradiderit victoriam, quā occupauerit. quo exemplo Sertorius barbaros, quos ratione flectere non poterat, in suam sentētiam pertraxit<sup>b</sup>. Porro quemadmodum non temerè fortuna tentāda est, & ardua sus-

<sup>a</sup> Plut. in a  
poph.

<sup>b</sup> Val. Max.  
lib. 7. cap. 3.

12 cipienda: sic ab inceptis \* non facile discedendum est, exemplo Marcelli. cū enim multa, succedentes temerè moenibus, in oppugnatione Casilini, Roma-

DE IVRE ET OFF. BELL.

ni milites acciperēt vulnera, neque satis  
 cœptis succederet: & Fabius omittendā  
 rem parvam, ac iuxta magnis difficilem,  
 & abscedendum inde censeret, quòd res  
 maiores instarent: Marcellus, multa ma-  
 gnis ducibus sicut non aggredienda, ita  
 semel aggressa non dimittenda esse di-  
 cendo, quia magna famæ momenta, in  
 vtramque partem fierent: tenuit ne in-  
 cepto abiretur <sup>a</sup>. Quare laudandi quoq;  
 Cæsaris milites, qui cū in obsidione  
 Auarici, omnium rerum difficultate affi-  
 cerentur, & Cæsar ob inopiam se dimis-  
 surum oppugnationē diceret: vniuersi  
 ab eo, ne infecta re discederet, petebant:  
 hoc se ignominie loco laturos, si inceptā  
 oppugnationem relinquerent, dicēdo <sup>b</sup>.  
 fama siquidem bella stare meritò summi  
 duces existimauere, & eum, qui recede-  
 bat, fugere credi. Vnde cū in reliquis  
 rebus, tum præsertim in bello cōstantia  
 \* atque fiducia imperatoris plurimum <sup>13</sup>  
 præstant, & sæpe ad vniuersi belli euentū  
 maximi sunt momenti, cuius rei specio-  
 sa exempla nobis præbent Romani; & in  
 primis, quòd Cannensi clade, exhaustis  
 imperij viribus, supplementū exercitus  
 in Hispaniam mittere ausi, fecerunt ne  
 hosti-

<sup>a</sup> *Linus 1, 24*

<sup>b</sup> *Cæs. de bel. gall. lib. 7.*

hostilium locus castrorū, tum maximè Capenam portam armis Annibale pulsante, minoris veniret, quàm si Pœni illā non obtinuissent. Ita se gerere, inquit Val. Max<sup>a</sup>. quid aliud est, quàm sæuien- <sup>a lib. 3. c. 7.</sup> tem fortunam in adiutoriū sui pudore victam conuertere? Quò spectat, quod Cæsar dicebat, si non omnia secunda cederent, fortunam esse industria subleuādam. Pari fiducia Scipio Aphricanus, speculatores Annibalis, in castris suis deprehensos, nec supplicio affecit, nec de consiliis & viribus Pœnorum percūctatus est: sed traditos eos tribunis militū, iussosq; omisso metu visere omnia, per castra, quo vellēt, duci iussit: percunctatusque satin percommodè omnia explorassent, datis qui prosequerentur retrò ad Annibalē dimisit, quo tam pleno fiducia spiritū Scipio prius animos hostium, vt inquit Val. Maxim<sup>b</sup>. quàm ar- <sup>b lib. 3. c. 7.</sup> ma contudit: nam Annibal maximè hostis, fiducia percussus, protinus nūcium ad Scipionem misit, vt colloquendū secum potestatem faceret, æquiores impetrari posse pacē ratus, si integer, quàm si victus peteret <sup>c Linius l. 30</sup>. Porrò summi duces facile percipientes, quantum haberet in

DE IVRE ET OFF. BELL.

se boni constantia, atque fiducia, solent ante confictum magno studio illud agere<sup>a</sup>, quò maximè confidentē sibi red- 14  
derent exercitum, & militum animos confirmarent, quod variis modis faciebant. Valerius Corvinus dictator, cum Samnitibus bellum gerens, priusquam signum pugne proponeret, leuibus certaminibus, tentandi hostis causa, aliquot dies moratus est, ne scilicet nouum bellum suos, nouusque hostis terreret<sup>a</sup>. Q. Fabius consul, decertaturus cum Hetruscis, quò animus militum multitudine territus restitueretur, Samnitium bella, que magna felicitate confecerant, extollebat, eleuabat Hetruscos, nec hostē hosti, nec multitudinem multitudini comparandam esse aiebat: præterea telum aliud occultum scituros in tempore, interea taceri opus esse: quibus ambagibus prodi simulabat hostes, & suos mirū in modum confirmabat<sup>b</sup>. in quo certè solertia Fabij meritò laudanda, & ab imperatoribus imitanda est. communi enim fit vitio naturæ, vt Cæsar dicebat<sup>c</sup>, vt inuisis latitantibus, atque incognitis rebus magis confidamus, vehementiusque exerceamur. &, vt inquit Liuius, sæpe

a Liuius l. 7.

b Liuius l. 9.

c de bel. ciuil.  
lib. 2.

sæpe vana pro veris maximè in bello va-  
 luerunt. Veteres quoq; ad confirman-  
 dos militum animos, causam religionis  
 peridoneam censebant. quò spectât om-  
 nia auspicia & oracula, quæ si fortè ad-  
 uersi quid signi facere viderentur, solent  
 nonnunquam imperatores, solerti qua-  
 dam interpretatione, in bonum vertere,  
 vt militibus timorem eximerent. cuius  
 rei exstant innumera exempla. Et qui-  
 dem, quemadmodum multa ad confir-  
 mandos militum animos facienda sunt,  
 sic quoque magno studio, illa quæ metû  
 15 inferre possent\*, aut militû animos qua-  
 cunque ratione alienare, suppressenda  
 sunt. nam, vt Cæsar dicebat, vt corporis  
 vulnera, ita exercitus incommoda tegē-  
 da sunt: ne ea nudando, militibus timor  
 addatur, & hostibus audacia crescat. in  
 quo, iure Terentius Varro reprehēden-  
 dus videtur. nam cùm accepta clade Cā-  
 nensi, Campani legatos ad eum Venusiā  
 misissent, quò cum paucis, ac semiarmi-  
 bus venerat: ita auxit rerum suarum sui-  
 que contemptum, nimis detegendo cla-  
 dem, nudādoque, vt qui prius agrè ferre  
 se, aduersi aliquid accidisse Romanis nū-  
 ciallent, pollicitique essent, omnia quæ

DE IVRE ET OFF. BELL.

ad bellum opus essent: reuersis domum legatis (qui ex contēptu consulis, & eius oratione, quæ desperationē rerū omniū continebat, quasi deletū videretur nomen Romanorum, referebant) omnes ad defectionem spectarent: confisi se totius Italiae imperio potiri posse, atq; ita foedus cum Annibale fecerunt<sup>a</sup>. Similiter Philippus Macedonum rex, imprudenti consilio, aliquid ad charitatē suorum, & vt promptius pro eo periculum adirent, ratus profecturum se, si equitū, qui ceciderant in leui quodā prelio cum Romanis, sepeliēdorum curam habuisset: afferri eos in castra iussit, vt conspiceretur ab omnibus funeris honos. nam quod promptiores ad subeundam omnem dimicationem putabat facturū, id metum pigritiamque incussit. qui enim hastis, sagittisque, & rara lanceis vulnera facta vidissent, inquit Liuius<sup>b</sup>, cum Græcis, Illyricisque pugnare assueti: postquam gladio Hispaniensi detrūcata corpora, brachiis abscissis, aut tota ceruice defecta, diuisa a corpore capita, patentiaque viscera, & foeditatem aliam vulnerum viderūt: aduersus quæ tela, quosque viros pugnādum esset, pauidi vulgò cerne-

<sup>a</sup> Liuii l. 22

<sup>b</sup> lib. 31.

cernebant. Itaque Romani, cùm P. Rutilij Lupi cons. bello sociali cæsi, cadauere, & aliorum non paucorum nobilium, in urbem relato, videret populum eo spectaculo commoueri & terreri: S. C. decreuerunt, vt exinde mortuorum in bello corpora, ibi humarentur, vbi cūque cecidissent: ne ob eorum conspectū reliqui segniores ad militiam fierent. quod decretum mox cognitū, & hostes imitati sunt<sup>a</sup>. Ceterum Chabrias Atheniensium dux, optimum hunc imperatorem esse dicebat, qui maximè cogitas haberet res<sup>\*</sup> hostium<sup>b</sup>: quarum certè ignoratione multos fugatos exercitus, & de summa rerum non semel in periculum ventum fuisse legimus. Itaq; Cassius a Cæsarianis in suo cornu victus, & castris exutus, credens Brutum quoque superatū, qui in suo cornu vice rat, quasi desperatis rebus, sibi ipsi mortē consciuit. Simili errore, cùm inter Romanos & Volscos magno prælio certaretur, & nox incertos diremisset: tantus ab imprudentia euentus vtraque castra tenuit timor, vt relictis faucibus, & magna parte impedimētorum, ambo pro victis exercitus se in montes proximos reciperent.

<sup>a</sup> Appian. de bel. ciuil. l. 1.

<sup>b</sup> Plut. in a. poph.

DE IVRE ET OFF. BELL.

*a Linnii li. 4* rent a. & Curio legatus Cæsaris, bello  
 ciuili, temerè credens perfugis, qui lu-  
 bam regem (qui Pompeio cum magnis  
 copiis auxilio venerat) reuocatum fini-  
 timo bello, & Suburrain eius præfectū,  
 cum mediocribus copiis missum assere-  
 rent: prælium temerè commisit, & vna  
 cum exercitu a copiis regis circumuen-  
 tus, ad interneccionem cæsus est *b*. Vnde  
*b Cæs. de bel. ciuil. lib. 2.* cùm vitio naturæ, vt ait Cæsar, quæ vo-  
 lumus, & credimus libèter, & quæ senti-  
 mus ipsi, reliquos sentire speramus, non  
 temerè transfugis, & exploratoribus *\*fi- 17*  
 dem habere debemus. in quo Gallorū  
*c d. bello gallico lib. 4.* morem idem Cæsar *c* reprehendit: qui  
 quibuscunque rumoribus, & auditioni-  
 bus permoti, de summis sæpe rebus cō-  
 filia ineunt, quorum eos e vestigio præ-  
 nitere necesse est: cùm incertis rumori-  
 bus seruiant, & plerique ad eorum vo-  
 luntatem ficta respondeant. Quare ex-  
 pedit, vt illi, qui cum imperio lunt, vbi  
 duriora quædam occurrunt, speculatum  
 ipsi prodeant: exemplo Marcelli, qui ad  
 collegam dicebat: Quin imus ipsi cum  
 equitibus paucis exploratum: subiecta  
 enim res oculis, certius dabit consilium.  
 Omnium autem maximè proderit im-  
 perator,

18 perator\*, si ad omnia quæ aspera atque ardua sunt, se ducem præbeat. si quidem iniungere inferiori velis, id prius in te, ac tuos si ipse iuris statueris, facilius omnes obedientes habeas. Imitari itaque debet quilibet bonus imperator, fortem & strenuum ducem, populo Israëlitico diuinitus excitatum & datum, Gedeonem, suos ita alloquentē: Quod me videritis facere, id vos quoque facite. a capite enim, vt inquit Seneca, bona valetudo transit in reliqua membra. suntque in hanc rem præclara Valerij Coruini verba inquentis: Cùm gloria belli, ac virtute sua quemque fretos, ire in aciem debere; tum etiam intueri, cuius ductu auspicioque, ineunda pugna sit: vtrum qui audiendus, duntaxat magnificus adhortator sit, verbis tantum ferox, operum militarium expers: an qui & ipse tela tractare, procedere ante signa, versari in media mole pugnae sciat. facta mea, non dicta, vos milites sequi volo, nec disciplinam modò, sed exemplum etiam a me petere, qui hac dextra mihi tres cōsulatus, summamque laudē peperit<sup>a</sup>. Sic certè C. Cæ-  
a Livium l. 7.  
 stens fugientibus, retinensque singulos,  
 & con-

DE IVRE ET OFF. BELL.

*a Sueton, in  
Caesar.* & contortis faucibus conuertens in ho-  
stem <sup>a</sup>. Itaque ancipiti illo prælio, quo  
cum iuniore Pompeio in Hispania con-  
flictus, suis præ pauore trepidè pugnantibus,  
cùm res esset in maximo discrimine,  
& nihil exhortationibus proficeret;  
arrepto cuiusdam clypeo, increpitisque  
militibus, procurrit in hostem, dicens:  
Nunc & mihi finis vitæ erit, & vobis mi-  
litæ. quo factò pudori cedente metu, a-  
ciem restituit, ducentis telis in clypeo  
acceptis <sup>b</sup>. In quo tamen maximè indu-  
*b Appian. de  
bell. civil. l. 2.* striam imperatoris\* requiro, vt sua qui- 19  
dem alacritate militũ animos ad quod-  
uis periculum subeundũ paratiores red-  
dat: non temerè tamen periculo sese ex-  
ponat: præsertim ad quem summa re-  
rum spectat: nisi maxima necessitate id  
exigente, & cùm de totius belli euentu  
agitur. multas enim vrbes euerfas, plures  
fufos fugatosque exercitus, imperato-  
rum temeraria morte legimus. Itaque  
mors P. Scipionis in Hispania, dum sese  
nimium hostium telis offert, vt hostes  
haud dubiè pro victoribus, & Romani  
*c Livius l. 25* pro victis essent, effecit <sup>c</sup>. & vulnus Cn.  
Scipionis ad Mundam vincētibus egre-  
giè Romanis, sed de salute imperatoris  
solli-

sollicitis pauorem iniecit, & haud dubie  
 & præclaræ victoriæ impedimêto fuit<sup>a</sup>. a Lanius l. 24.  
 Sic quoque cùm Annibal in Sagūti op-  
 pugnatione, dum murum incautius su-  
 bit, vulneratus caderet, tanta circa eum  
 fuga atque trepidatio fuit, vt non mul-  
 tum abesset, quin opera ac vineæ dese-  
 rerentur<sup>b</sup>. Sic cum Epaminonda, dum b Lanius l. 21  
 non ducis tantum, verum etiam fortif-  
 simi militis officio fungitur, vires quo-  
 que reipubl. Thebanæ ceciderunt, nam  
 vt inquit Iustinus<sup>c</sup>, sicuti telo si primam c lib. 6.  
 aciem perfreris, reliquo ferro vim no-  
 cendi sustuleris: sic illo velut mucrone  
 teli ablato duce Thebanorum, reipubl.  
 vires hebetatę sunt: vt non tam illū ami-  
 sisse, quàm cum illo interiisse omnes vi-  
 res Thebanorū viderentur. Non itaque  
 nimiū fidant fallaci fortunæ principes,  
 neque etiam clypeo Iouis: sub quo eos  
 versari dixit Homerus: sed in periculis  
 suscipiendis, vt inquit Cicero<sup>d</sup>, consue- d offic. lib. 2.  
 tudo imitanda medicorum, qui leuiter  
 ægrotantes leuiter curant, grauioribus  
 autē morbis periculosas curationes ad-  
 hibere coguntur. Huc spectare videtur,  
 quod Æmilius Paulus dicebat, cū victo  
 Perseo pro gratulatione victorię cōiuiua  
 cele-

DE IVRE ET OFF. BELL.

celebraret: eiusdem scilicet esse peritiæ, exercitum hostibus valde terribilem, & amicis conuiuium valde iucundum reddere<sup>a</sup>. Et Scipio African. cùm eum quidam parum pugnacem dicerent: Imperatorem me mater, non bellatorem peperit, respondit: vt ostenderet, vincendi rationem in vnus potius scientia & ingenio, quàm in multorum viribus & armis esse. non enim eadem militares, & imperatoriæ artes sunt. Præterea imperator, vel potius summus princeps<sup>x</sup>, meminisse debet cõsiliij Antigoni: qui sæua tempestate iactatus, cùm in eadem naue secum suos omnes habuisset: præcepisse liberis dicitur, vt & ipsi meminissent, & ita posteris proderent: ne quis cum tota gente simul in rebus dubiis periclitari auderet. cuius præcepti memor Philippus, Romanis bellum illaturus, duos simul filios in aleam eius, qui proponeretur casus, cõmittere noluit: itaque maiorem secum duxit; minorem ad custodiam regni remisit in Macedoniã<sup>b</sup>: prudentes patresfamilias imitatus, qui soliti sunt, non omnem vnum in locum pecuniam reponere, ne si chasmate, incêdio, aut bello fortè periret, vniuersa etiam interi-

<sup>a</sup> Pluc. in a  
poph.

<sup>b</sup> Lium l. 40

interiret hominis substãtia, quò spectat  
 iactarum inter agricolas adagium, cuius  
 admonet Celsus<sup>a</sup>. Pecuniã sine peculio  
 fragilem esse. quem locum pulchrè ex-  
 plicat Corrasius<sup>b</sup>. Porrò nõ solùm bel-  
 21 landi virtus<sup>\*</sup>, vt inquit Cicero<sup>c</sup>, in sum-  
 mo & perfectò imperatore quærèda est,  
 sed multæ sunt artes eximię huius admi-  
 nistræ, comitesque virtutis. In primis  
 autem requiritur in eo, qui aliis impe-  
 rare vult, vt sibi, & cupiditatibus suis im-  
 perare possit, & imperium, quod in alios  
 exercere vult, omnium grauissimè & fe-  
 uerissimè in seipsum exerceat. neque e-  
 nim potest exercitum continere is im-  
 perator, qui seipsum non continet: neq;  
 feuerus esse in iudicando, qui alios in se  
 feueros esse iudices non vult. refrenet  
 ergo libidines, spernat voluptates, ira-  
 cundiam teneat, coërceat auaritiam, &  
 ceteras animi labes repellat. cui quidem  
 ira affecto, vt inquit Cicero<sup>d</sup>, quæ vim  
 habere maximam dicitur, præsertim in  
 bello, fortuna ipsa cedit: quę, sicut sapiens  
 poëta dixit, suis cuique fungitur mori-  
 bus: quemadmodum de M. Porcio Ca-  
 tone traditur, viro omnibus virtutibus  
 prædito, tantam in eo vim animi inge-  
 nique

<sup>a</sup> in l. sicho-  
 rus. §. 1. D.  
 de legat. 3.

<sup>b</sup> Miscellan.  
 iur. cons. lib. 1  
 cap. 13.

<sup>c</sup> pro lege  
 Manil.

<sup>d</sup> in Para-  
 dox.

DE IVRE ET OFF. BELL.

nūquē fuisse: ut quocunque loco natus  
 esset, fortunatū sibi ipse facturus videretur,  
 tam in rebus bellicis, quā in civili-  
 bus<sup>a</sup>. & non temerē creditum fuit, felici-  
 orem futurum Alexādrum Magnum,  
 si vicisset superbiam, atque iram, mala in-  
 uicta, aliāque animi vitia: sed quem Per-  
 farum arma non fregerunt, vitia vice-  
 runt<sup>b</sup>. Agesilaus verō summus dux, dice-  
 bat, malle se vincere malas cupidita-  
 tes, quā maximam hostium urbem ca-  
 pere. melius enim esse, suam ipsius con-  
 servare libertatem, quā aliis eam ad-  
 mēre<sup>c</sup>. & Scipio ex capta Carthagine  
 non maiorem gloriam meruit, quā  
 quod captivā adeo eximia formā inter  
 ceteras, ut quacunque incederet, con-  
 uerteret in se omnium oculos, inuolatā  
 & intactam sponso Allucio restituerit,  
 precio redemptionis illi in dotē dato<sup>d</sup>.  
 & idem Scipio, cōciliata sibi clementiā,  
 & continentiā fama plus in Hispania  
 profecit, quā inuictis Romanorū ar-  
 mis. Itaque cū poētæ monstra ab Her-  
 cule domita, & tyrannos occisos fingūt,  
 indicant bonum imperatorem, cuius  
 exemplum nobis Herculem proponūt,  
 corruptos animi affectus cōprimere de-  
 bere.

<sup>a</sup> *Liuius l. 39*

<sup>b</sup> *Quint. Cur-  
tius lib. 6.*

<sup>c</sup> *Plus. in a-  
popb.*

<sup>d</sup> *Liuius l. 26*

22 bere. Ceterum imperio alicui delato<sup>a</sup>, consultum erit, liberum illi de summa rerum statuendi arbitrium permittere, exemplo senatus, populiq̄ue Rom. qui omnium rerum arbitrium, quod ad bellum attinet, imperatori permittebāt, & utrū sedendo, an dimicando rem gerere, hoc vel illud oppidū oppugnare visum esset, ipsius iudicio relinquebant, neque quicquam sibi reseruebāt, quā auctoritatem noui belli indicēdi, aut foederis sancienti cum hoste: quæ summi imperij esse alio loco ostendimus<sup>a</sup>. Itaque Q. Fabius cons. in Hetruscos missus, vt sociis Sutrinis, quos Hetrusci obsidebant, opem ferret, Hetruscis prælio fuis, fugatisq̄ue, inconsulto senatu, per siluam Ciminiam hostes persecutus, in Hetruriam bellum transtulit<sup>b</sup>. & Cn. Manlius cons. Antiocho deuidto, Gallogræcis, quod Antiochum auxiliis iuuisent, sine senatus auctoritate, & iniussu populi, bellum intulit: & nec quicquam criminantibus eum legatis, qui cum eo fuerant, triumphās in urbem inuectus est<sup>c</sup>.

Similiter Cæsar, cui Gallia prouincia obtigerat, Germanis Gallia expulsis Rhenum trāsiiuit, vt cum Sicambri bellum ge-

<sup>a</sup> 5, li. 1, c. 6.

<sup>b</sup> *Liuius* l. 9.

<sup>c</sup> *Liuius* l. 38.

Q lum ge-

DE IVRE ET OFF. BELL.

lum gereret, quòd illos, qui sibi Gallia-  
que bellum intulerat, & in fines Sicam-  
brorum se receperant, dederè nollent: &  
in Britanniam quoque exercitum tran-  
stulit, quòd omnibus fere gallicis bellis,  
hostibus Romanorù inde subministrata  
auxilia intelligebat: hæcque omnia ex  
suo tantum arbitrio fecit<sup>a</sup>. Cn. autem  
Pompeio bellum aduersus piratas lege  
Gabinia in triennium ita mandatù fuit,  
vt toto mari, quod est intra columnas  
Herculis, & in maritimis prouinciis, vsq;  
ad quadringentesimum a mari stadium,  
potestatem haberet imperandi regibus,  
præsidiibus, ciuitatibus, vt se omnibus ad  
eius belli administrationem necessariis  
iuuaret<sup>b</sup>. & Q. Fabio Max. dictatori per-  
missum fuit, vt omnia faceret, vt e re pu-  
blica duceret. & T. Quintio cons. liberù  
arbitrium pacis, ac belli cum Philippo  
permisum fuit<sup>c</sup>. in quo meritò pruden-  
tiam senatus populiq; Rom. laudes.  
nam qui ex alieno metu, voluntateque  
pendet, nihil magnum præstare potest.  
Difficile quoque fuisset senatui, ea quæ  
oculis subiecta non sunt, suo iudicio ad-  
ministrare: & vbi castra locanda essent,  
scire: quæ loca præsidiis occupanda:  
quando

<sup>a</sup> *Cæsar de  
bell. gal. lib. 4*

<sup>b</sup> *Plut in Põ  
pe. Cicc. pro  
lege man. Ap-  
pian. in Mi-  
thyrd.*

<sup>c</sup> *Linus l. 32*

quando cum hoste configendum: quādo quiescendū esset, præscribere: & terra, quod aiūt, gubernare: præsertim cū puncto tēporis, vt inquit Liuius, cuius præteruolat opportunitas, si cunctatus paululū fueris, ne quicquā mox amissam queraris. Porrò quò maiori animo, & omnibus curis libero, ad summā rerum imperatores consulere possent, ne metu supplicij a re gerenda deterrerentur: senatus, populusq; Romanus, re fortè male gesta, fortunā tantū belli incusans, nunquam crudelius quicquā in eos statuit: nec vnquam atrocior in eos, qui temeritate, atq; inscitia, exercitus amisissēt, fuit, quā vt pecunia eos multaret: capite anquisitum ob rem bello male gestā, de imperatore fere nunquā fuit: ipsam calamitatē satis pœnæ esse existimantes, & laude frustrari. cuius rei exēplo sunt M. Sergius, & P. Virginius tribuni militum cōsulari potestate, bello contra Veiētes, nā cū fortè hostes ea regione, qua M. Sergius præerat, castra adorti essent: nec se iā Romani ab hostibus tueri possent, & sola spes esset, si a maioribus castris subueniretur, quibus Virginius præerat priuatim Sergio inuisus & infestus:

Q 2 noluit

DE IVRE ET OFF. BELL.

noluit Virginius collegæ auxilium submittere, nisi peteret: & Sergius, nequam opem videretur ab inimico petiisse, vincti ab hoste, quàm vincere per ciuē maluit: ita vt huius pertinaciam arrogantia alterius æquaret: quo factū est, vt milites diu in medio cæsi, postremò desertis munitionibus perpauci in maiora castra, pars maxima atq; ipse Sergius Romam pertenderet: vbi acta vtriusq; causa in senatu, & apud populum die dicta, tantum denis millibus æris grauis rei damnati sunt <sup>a</sup>. Similiter M. Postumius tribunus militum cōsulari potestate, quòd ad Veios eius opera male pugnatū esset, decem quoque millibus grauis æris: & C. Sempronius conf. ob ignominiam Volscici belli, quindecim millibus æris damnati sunt <sup>b</sup>. solū inuenio de Cn. Fulvio prætore, ob exercitum in Apulia amissum (cū omnibus probris oneraretur, & iurati multi dicerent fugæ pauciorisq; initium a prætore ortum, ab eo desertos milites, cū haud vanum timorem ducis crederent, terga dedisse) capite acquisitum fuisse: qui priusquam dies comitorum adesset, exulatum Tarquinios abiit <sup>c</sup>. Multis verò annis ante,  
Sp. Ser-

<sup>a</sup> *Linus l. 5.*

<sup>b</sup> *Linus l. 4.*

<sup>c</sup> *Linus l. 36*

Sp. Seruilius, vt consulatu abiit, reus capitis fuit, a trib. pleb. die dicta, quòd Hetruscòs in castra fugientes audacius quàm prudentius persecutus, robur iuuentutis amisisset. sed cùm id indignissimè ferrent patricij, rem non ferendam dictitantes, eos qui se pro republica impigrè hostibus obijciant, si fortuna minus faueat, ignauix accusari ab iis qui nunquàm in acie steterint: rãtum potuerunt apud populum, vt omnium calculis reus absolueretur: ostendètes non esse e repub. damnari duces ob infortunium <sup>a</sup>. Atqui in C. Terentium Varronem consulem, cuius temeritate, inconsulto collega L. Æmilio Paulo clades illa Cannèsis Romanis illata est, ex qua relicto exercitu, & collega fortiter mortuo profugit, nò solùm non est animaduèrsus ob rem male gestam, sed etiam ex tanta clade redeunti obuiam itum frequenter est, & gratix actæ, quòd de republ. non desperasset: cui, si Carthaginensium ductor fuisset, nihil recusandum supplicij foret <sup>b</sup>. Fuere enim <sup>c</sup> Carthaginenses in militiæ negotiis tam asperi, vt imperatores, qui prauo cõsilio, qaamuis prospero euentu rem gessissent, in crucem tolle-

<sup>a</sup> Dion Hist. ant. Ro. lib. 9

<sup>b</sup> Livius l. 22

DE IVRE ET OFF. BELL.

rent : quod bene gesserant, deorum im-  
mortalium adiutorio, quod male admi-  
serant, ipsorum culpæ imputantes<sup>a</sup>. Ita-  
que Mago insignis Carthaginiensium  
imperator, qui primus omnium impe-  
rium Pœnorum ordinata disciplina mi-  
litari constituit, viresque ciuitatis non  
minus bellandi arte quam virtute firma-  
uit<sup>b</sup>, ob rem male gestam contra Syra-  
cusanos, metu supplicij seipsum interfe-  
cit : quo non contenti Carthaginienses,  
morrui corpus in crucem sustulerunt<sup>c</sup>.  
Sciendum autem hanc laxam, & largam  
de summa rerum liberè consulendi po-  
testatem, imperatori tributam, in magi-  
stro equitum, tribuno, vel alio qui im-  
peratore inferior est, admodum restrictã  
fuisse : vt suo loco dicemus<sup>d</sup>. & quidem,  
quantumuis libera permittatur duci re-  
rum omnium, ex arbitrio suo admini-  
stratio : nihilominus, si quid fraudulen-  
ter fecerit, de eo tenebitur. nam plenè  
quidem, vt inquit Scæuola, sed quatenus  
res ex bona fide agenda est, mandatum  
censetur<sup>e</sup>. & quod in arbitrium alius  
confertur, semper ad boni viri arbitrium  
referendum est.<sup>f</sup>

<sup>a</sup> Vale. Max.  
lib. 2. cap. 7.  
Liuins lib. 38

<sup>b</sup> Iustim. l. 19

<sup>c</sup> Plut. in vi.  
Tmolconis

<sup>d</sup> J. de offic.  
legati tribuni  
lib. 3.

<sup>e</sup> in l. credi  
tor. §. Lucius.

<sup>f</sup> l. in perso  
nam. §. gene-  
raliter. D. de

reg. iur. l. hec  
reditio. D. de

contr. emptio.

l. si in lege. D.  
locati. l. si so-

cietatem. D.  
pro socio.

SE

LIBER SECVNDVS. 122

SEQVNTVR PROPO-  
SITIONES QVAEDAM BEL-  
LICÆ, ET CAUTIONES IMPERATO-  
RIÆ, veterum exemplis stabilitæ.

Vnum non plures exercitui præfici debere, cum potestate libera, eundemq; c tinuum, nec eum quem prius offenderis, ignomi- niæ affeceris.

- 1 *Plurium imperium bello inutile.*
- 2 *Quando dictator creari solitus apud Ro-*
- 3 *dictatoris potestas. (manos.)*
- 4 *Non nisi confecto bello successor impera-*  
*tori mittendus.*
- 5 *Monarchia optima reipub. status.*
- 6 *Periculosum eum quem offenderis sum-*  
*ma rerum præficere.*

CAPVT TERTIVM.

**Q**uattuor tribuni militum consulari potestate Romæ creari, quorum tres delectu habito profecti sunt Veios, documento fuere, inquit Liuius<sup>a</sup>, quàm <sup>a lib. 4.</sup> plurium imperium \* bello inutile esset: tendendo ad sua quisque consilia, cum aliud alij videretur, aperuerunt ad occasionem locū hosti: incerta namq; acie, signū aliis dari, receptui aliis cani iubētib; inuasere opportune Veiētes, & in fugā egere. Cōsimiliter L. Æmilius Paul<sup>o</sup>,

Q 4      ac Te-

DE IVRE ET OFF. BELL.

ac Terentius Varro aduersus Annibalē:  
nec ita pridem Germanorum principes  
aduersus Carolum v. magno suo damno  
expertisunt, nihil a pluribus rectē im-  
perari posse. Itaque Græci & Romani\*, 2  
cū graue bellum, aut seditio ciuilis rē-  
publicam perturbaret: ad vnus dictato-  
ris aut Archi, aut Harmostæ imperium,  
velut ad sacram anchoram confugiebāt.  
vnde Romanis a Veientibus victis: Mœ-  
sta ciuitate, inquit Liuius<sup>a</sup>, vinci insueta,  
ad dictatorem creandum recursus est.  
& alibi, Tumultuante Romæ plebe, cū  
res ad maximam seditionem spectaret,  
trepidipatres, inquit Liuius<sup>b</sup>, ad duo vl-  
tima auxilia, summum imperium, sum-  
mumque ad ciuem decurrunt, dictatorē  
dici placet: dicitur M. Furius Camillus.  
Item Flaminio cum maxima parte exer-  
citus ad Trasymenum cæso, cū magna  
trepidatio Romæ esset, ad remedium iā  
diu desideratum, inquit Liuius<sup>c</sup>, nec ad-  
hibitum, dictatorem dicendum ciuitas  
confugit. & vt idem refert<sup>d</sup>, cū Præne-  
stini discordia Romanorum freti, ra-  
ptim agmine factō, peruastratis agris ad  
portam Collinam signa inferrent, Ro-  
mani a seditione ad bellum versi, dicta-  
torem

a lib. 4.

b lib. 6.

c lib. 22.

d lib. 16.

torem T. Quintium Cincinnatum creauere : quod vbi auditum est (tantus eius magistratus terror erat) simul hostes a mœnibus recessere, & iuniores Romani ad edictū sine detrectatione conuenere. Itaque non temerè creditum est, quod Liuius sensit<sup>a</sup>, Gallos urbem Romā non a lib. 5. capturo. fuisse, si, quēadmodum aduersus Fidenatem ac Veientem hostem, aliosque finitimos populos, vltima experiens auxilia, multis tēpestatibus ciuitas fecerat: dictatorem dixisset, contra inusitatum, & inauditū hostem, ab Oceano, terrarumque vltimis oris bellum cientem. 3 Dictator verò \*optima lege creatus, summum imperium belli, pacis, pœnarum ac præmiorū sine prouocatione habebat : vt liber impedimentis omnibus melius ad summam rerum cōsulere posset<sup>b</sup>. Qua ratione T. Quintio, & Agrippa Furio cōsulib. in Æquos & Volscos profectis, cū duo cōsules in exercitu Romano pari potestate essent, quod saluberrimum in administratione rerū magnarū est, inquit Liuius<sup>c</sup>, summa imperij, concedente Agrippa, penes collegam erat. Similiter Aristides, summus vir, & Atheniensium imperator bello

<sup>b</sup> Pomp. in l.  
2. S. p. palo.  
Dedcorig sur.

<sup>c</sup> lib. 3.

DE IVRE ET OFF. BELL.

Marothonio, cùm plures imperatores more Atheniensium creati essent, pari potestate, Milciadi collegæ, vt solus imperaret, concessit, atque reliquis collegis, vt idem facerent, auctor fuit. idque consilium constat sublatis contentionibus, gloriosissimam de Medis victoriam Atheniensibus peperisse<sup>a</sup>. Quàm autem expediat, duci exercitus liberam de summa rerum cōsulendi potestatem permittere, superiore capite ostēdimus. Porrò cùm minimè conueniat, interrumpi tenorem rerum, in quibus peragendis continuatio ipsa efficacissima est; non nisi confecto bello successorem imperatori mitti expedit. nam inter traditionem imperij, nouitatemque successoris: qui noscendis prius, quàm agendis rebus imbuendus sit: sæpe bene gerendæ rei occasiones intercidunt. Quare Fabius Max. monuit populum, vt magno iudicio consules crearent, qui possent esse pares Annibali: Nam, inquit, cùm, qui est summus in ciuitate dux, eundem elegerimus, tum repente lectus in annum, aduersus veterem & perpetuum imperatorē comparabitur, nullis neque temporis, neque iuris inclusum

<sup>a</sup> *Plut. in A. v. 110.*

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clusum

„ clusum angustiis , quo minus ita om-  
 „ nia gerat , administretque , vt tempo-  
 „ ra postulabunt belli : nobis in appara-  
 „ tu ipso , ac tantùm inchoantibus res an-  
 „ nus circumagitur <sup>a</sup>. Vnde etiam Li- <sup>a</sup> *Liuij 1,24*  
 uius <sup>b</sup>, cùm Romanos duces cum Ale- <sup>b</sup> *lib.9.*  
 xandro comparat , eo mirabiliores il-  
 los quàm Alexandrum , aut quemquam  
 alium regem facit, quòd denos vicens-  
 que dies quidam dictaturam, nemo plus  
 quàm annum consulatum gessit : ab tri-  
 buno pleb. delectus impediti sunt : post  
 tempus ad bella ierunt : ante tempus  
 comitiorum causa reuocati sunt : in ipso  
 conatu rerum circumegit se annus : col-  
 legæ nunc temeritas, nunc prauitas im-  
 pedimento aut damno fuit : male rebus  
 gestis, rebus alterius successum est : ty-  
 ronem, aut male imbutum disciplina e-  
 xercitum acceperunt . At hercle re-  
 ges (inquit) non liberi solùm impedi-  
 mētis omnibus, sed domini rerum tem-  
 porumque , trahunt consiliis cuncta,  
 non sequuntur. præterea supra hæc om-  
 nia incommoda , quam arborem quis  
 conferuit, ab ea legere alium fructum  
 indignum videtur. vt Qu. Fabius Max.  
 dicebat, petens Heturiam, extra ordinē  
 prouin-

DE IVRE ET OFF. BELL.

prouinciam sibi dari : qui aperuisset Ciminiam siluam, viamque per deuios saltus Romano bello fecisset\*. Et his quidem argumentis, & exemplis, multum iuuatur sententia eorum, qui monarchiam\* & regiam potestatem vniuersæ nature congruentem, optimum reipub. statum constituerunt. Quare etiam Sibylla carminibus suis augurata dicitur reipub. Romanæ salutem in regno positam esse, & ciues aliter seruari non posse, quàm si regem haberent. Nam vt Tiberius dicebat, fieri non potest, vt respubl. bene constituta, quod vnum tantum est corpus, plura capitâ habeat. Ceterum, periculosissimum quoque erit\*, eum quē offenderis, vel ignominia affeceris, summæ rerum præficere. cuius rei exemplo esse potest M. Liuius: qui cū ex consulatu populi iudicio damnatus, ignominiam ægrè ferens, in rus migrasset, & octauo post damnationem anno, in urbē reductus, iterum consul factus esset: memoriæ proditum est, plenum adhuc ira in ciues M. Liuium, ad bellum proficentem contra Annibalem, moneri Q. Fabio, ne priusquam genus hominum cognosceret, temerè manum cōsereret, respon-

respondisse, vbi primùm hostiũ agmen  
 conspexisset, pugnaturum: cumque  
 quæreretur, quæ causa festinandi esset:  
 Aut ex hoste egregiam gloriam, inquit,  
 aut ex ciuibus victis gaudium meritum  
 certè, etsi non honestum capiam<sup>a</sup>. Simi-  
 liter Harpagus, cum Astyages Medorum  
 rex illi infestus, in vltionem seruati ne-  
 potis Cyri, filium eius interfecisset, epu-  
 landumque patri tradidisset: ad tempus  
 dissimulato dolore, odium regis in vin-  
 dicte occasionem distulit: & postea cum  
 Cyrus Astyagi bellũ inferret, & Astya-  
 ges summam belli Harpago cõmisisset:  
 exercitum acceptum, statim Cyro per  
 ditionẽ tradidit, & regis crudelitatem  
 perfidia defectionis vltus fuit.<sup>b</sup>

<sup>a</sup> Livius 1, 27

<sup>b</sup> Livii lib. 1

Vtrum lenitate & benevolentia: an verò se-  
 ueritate & sãuitia plus proficiet imperator.

- 1 *Nullum animal maiore arte tractãdum,  
quàm homo.*
- 2 *Scipio humanitate, Annibal crudelitate,  
parem in rebus bellicis gloriam conse-  
cuti sunt.*
- 3 *Manlius seueritate, Valerius benigni-  
tate milites in officio continuerunt.*
- 4 *Caendum ne nimia lenitas pariat con-  
temptum,*

DE IVRE ET OFF. BELL.

*temptum, neque nimia sæuitia odium.*

5 *In principe requiritur benevolentia.*

6 *Non potest amor cum timore misceri.*

7 *Imperator apud suos milites plus proficiet comitate, quàm morum asperitate.*

8 *Homo beneficio & benevolentia inuitari cupit.*

9 *Obsequio mitigantur imperia.*

10 *Benevolentia etiam apud hostes multum potest.*

CAP. QVARTVM.

**N**ON solùm bellâdi virtutem in summo, ac perfecto imperatore quærêdam esse alibi diximus: sed multas alias esse artes eximias, huius administras, comitesque virtutis. & quidem, cùm nullum sit animal\*, vt sensit Seneca, maiore arte tractandum, quàm homo: queri solet, vtrùm in imperatore requiratur magis asperitas & sæuitia; an verò humanitas, & benevolentia. qua de re in ytramque partem innumera possent adduci exempla: & in primis sese offerunt Annibal, & Scipio\*, summi duces, qui diuersissimis ingeniis, longè diuersiore modo, ac ratione, parem ex rebus belli-

bellicis gloriam reportauere. hic enim in Hispaniam missus, innata sibi humanitate, & beneuolentia, non solùm militum animos sibi deuinxit: sed etiam conciliata clementiæ fama, totam Hispaniam Romanæ ditioris fecit: ille cōtrà, magna violentia, crudelitate, & rapina Italiam deuastauit, & omnes populi Italiæ, omnia fere oppida ad eum defecere: ita ut, quemadmodum Hispania, beneuolentia Scipionis, sic Italia, timore Annibalis subacta fuerit. Simile exemplum habemus in Manlio Torquato, & Valerio \* Coruino, qui pari virtute & gloria vixere Romæ: dispari tamen ingenio, & ratione procedendi. Manlius enim ferox natura, maximè seuerus in disciplina militari fuit: Valerius verò omni genere humanitatis, & beneuolentiæ milites profecutus est. vsque adeò, ut ad milites in officio continendos, ille filium victorem, & speciosâ spolia referentem, quòd eius iniussu pugnasset cū hoste, virgis cæsum securi percussit: hic verò neminem vel offenderit quidē. at tamen pro tam dissimili ratione agendi, non dissimilē fructū & gloriam retulere. nulla enim ynquam

seditio

DE IVRE ET OFF. BELL.

seditio inter vtriusque ducis milites orta fuit : nūquam vllus pugnam detrectavit, aut dicto minus obediens fuit : & vterque maximas res gessit. Manlius itaq; sua seueritate & imperiosis edictis, disciplinam militarem mirum in modū stabiliiuit : Valerius verò, tātum in militari disciplina seruans, innata sibi humanitate & lenitate militum animos flexit, & obedientissimos habuit : & si quos forte legum, & disciplinæ contemptores puniebat, non hoc imperatoris seueritati, sed constitutioni legū ascribebant. non enim vbi imperio, vbi lege agi poterat, volebat. & hæc exempla propositā quæstionem satis dubiam relinquunt. Porrò illud certè\* magno iudicio, vtramuis viā <sup>4</sup> sequamur, cauendum : ne nimia lenitas pariat contemptum : quod Scipioni euenit : inter cuius milites maxima seditio mota est in Hispania : neque nimia sæuitia odium excitet : quod Annibali accidit : qui crudeliter & auarè spoliādo ea, quæ tueri nequibat, vt vasta hosti relinqueret, omnium animos a se abalienauit, neque indigna patientium modò, sed ceterorum etiam : quippe ad plures exemplum, vt inquit Liuius<sup>a</sup>, quāmlamitas

<sup>a</sup> lib. 36.

lamitas pertinebat. Ceterum qui de in-  
 5 stitutione principis \* scripsere, potius  
 Valerium, & Scipionem imitādos pro-  
 ponunt, & humanitatem, beneuolentiā,  
 & similes virtutes in principe requirūt:  
 vt de Cyro scripsit Xenophon. maluse-  
 6 nim custos \*, vt inquit Cicero <sup>a</sup>, diutur- <sup>a offic. lib. 2.</sup>  
 nitatis metus, contraque beneuolentia  
 » fidelis est, vel ad perpetuitatem. & Præ-  
 » textatus apud Macrobiū <sup>b</sup>, Qui colitur, <sup>b Sat. lib. 1.</sup>  
 » inquit, etiam amatur: non potest amor <sup>c. 2.</sup>  
 » cum timore misceri. vnde putas arrogā-  
 » tissimum illud manasse prouerbiū, quod  
 » iactatur: Totidē nobis hostes esse, quot  
 » seruos? non habemus illos hostes; sed fa-  
 » cimus, cū illis superbissimi, contume-  
 » liosissimi, crudelissimi sumus. Itaq; præ-  
 » clarè Ennius.

*Quem metuunt, oderunt;*

*Quem quisque odit, perisse expetit.*

Et multorū odiis nullas opes posse ob-  
 sistere, interitu C. Cæsar̄is ostendit Ci-  
 cero <sup>c</sup>. atque hanc sententiam, etiam in <sup>c offic. lib. 1.</sup>  
 7 Imperatore\* confirmat exemplum Ap-  
 pij Claudij, & T. Quintij consl. Appius  
 enim in Volscos missus, vexando sæuo  
 imperio exercitum, hoc sua acerbitate  
 effecit, vt milites omnia segniter, ociosè,

R neglig-

DE IVRE ET OFF. BELL.

negligenter, contumaciter agerent : & eos nec pudor, nec merus coërceret, odio consulis exacerbatis omniū animis: vsque adeo vt Romanus exercitus in aciem productus, non solū vincere noluerit, sed vinci voluerit, & turpi fuga petierit castra. Quintius verò in Volscos missus, natura lenior, comitate & beneficiis animos militum sibi concilians, præda omni militi data, & laudes addens, quibus haud minus quàm præmio gaudent militum animi, rebus egregiè gestis, in urbem rediit <sup>a</sup>. Item Cæso Fabius cons. in Veientes missus, cū præter ceteras imperatorias artes, quas parando, gerendoque bello ediderat plurimas, ita instruxisset aciē, vt solo equitatu emisso, exercitum hostiū funderet, insequi fusos, pedes odio consulis, propter morum asperitatem, noluit, & iniussu signa retulit: nec huic tam pestilenti exemplo, inquit Liuius <sup>b</sup>, remedia vlla ab imperatore quæsitæ sunt : adeo excellētibus ingeniis citius defuerit ars, qua ciuem regant, quàm qua hostem superent. Similiter L. Papyrius dictator, ob sæuitiam, qua M. Fabium magistrum equitum (quod eius iniussu quāuis prospere

<sup>a</sup> *Liuius lib. 2*  
*Dion. Hal.*  
*lib. 9.*

<sup>b</sup> *lib. 2.*

sperè pugnauerat cum hoste) constantè  
 ad supplicium poposcerat, neque mili-  
 tibus gratus fuit, neque hostibus terribi-  
 lis: quam tamen maximam imperatoris  
 laudem esse cèset Agefilaus. itaque cùm  
 hostes ad castra Papyrij accessissent, tan-  
 tum momenti in vno viro Papyrio erat,  
 inquit Liuius<sup>a</sup>, vt si ducis consilia fauor <sup>a lib. 8.</sup>  
 subsecutus militum foret, debellari eo  
 die cum Samnitibus potuisse pro haud  
 dubio proditum sit: ita instruxerat acie  
 loco ac subsidiis, ita omni arte bellica  
 firmauerat: sed cessatum a milite, ac de  
 industria, vt obrectaretur laudibus du-  
 cis, impedita victoria fuit. verùm sensit  
 peritus dux, quæ res victoriæ obstaret:  
 temperandum ingenium suum esse, &  
 seueritatem miscendam comitati: atque  
 ita maxima dexteritate, fauciorum præ-  
 cipuè curam suscipiès, tantum profecit,  
 vt medèdis corporibus, animi prius mi-  
 litum imperatori conciliarentur: & re-  
 fecto exercitu, cum hoste congressus,  
 haud dubia spe sua militumque, fudit  
 fugauitque Samnites. Est itaque comi-  
 8 tate condienda\* grauitas, nam vt sapien-  
 tera Xenophonte scriptum est: cùm tri-  
 bus præcipuè rebus ad obtemperandum

DE IVRE ET OFF. BELL.

adducantur alia animalia, cibis abiectiora, delinimentis erectiora, verberibus contumacia: homo, quod est animal generosissimum, neque minis, neque suppliciis cogi vult, sed beneficio & benevolentia inuitari cupit. Cùm enim bruta se vi trahi sinant, homo non nisi ratione se duci patitur. Nihilominus tam è sciendum est, regum, ducumque clemètiã, vt Alexander Magnus dicebat, non in ipsorum modò, sed etiam in illorũ, qui parent, ingeniis sitam esse: obsequio enim mitigantur imperia. vbi verò reuerentia excessit animis, & summa imis confundimus, vi opus est, vt vim repellamus<sup>a</sup>. Ceterum benevolentia<sup>a</sup> & humanitas, nõ solùm apud milites & ciues prodest, sed etiam apud hostes nõ semel plus potuit, quàm inuicta Romanorum arma, vt exemplo Scipionis iam ostèsum est. & facit quoque exemplum Camilli, cùm Faliscos obsideret, qui alioqui diuturnus videbatur futurus labor, nisi sua beneficentia, tradens proditorem filiorum regis, ipsos ad deditiõem pellexisset<sup>b</sup>. Fabricij quoque liberalitas, cùm infidiantem vitæ Pyrrhi medicum, ipsi indicaret, regis animum fregit & vicit.

Huma-

<sup>a</sup> Q. Curt. l. 8

<sup>b</sup> Livius l. 5.

10

Humanitas itaque, vt inquit Valerius Maximus<sup>a</sup>, vincit iram, prosternit odiū, a lib. 5, ca. 4 hostilemque sanguinē hostilibus lacrymis permiscet.

Temporum rationem præcipuè in bello habendam.

- 1 *Aliter in bello, aliter in pace agendum.*
- 2 *In pace consuetudini, in bello utilitati parendum.*
- 3 *Sententia Fabij Max. de Altinio transfuga.*
- 4 *Marcellus L. Brantium beneficio sibi conciliare, quàm pœna cohibere maluit.*
- 5 *Scipio Nasica, priuato consilio conuocatis bonis, Gracchum oppressit.*
- 6 *Octavius Cæsar sua sponte bellum intulit Antonio.*
- 7 *Silent leges inter arma.*
- 8 *Necessitas ex illicito facit licitum.*
- 9 *Non dicitur fieri contra legem, quod urgente necessitate fit.*
- 10 *Ex occasionibus belli ratio commutanda.*
- 11 *Fabius natura cunctator non iudicio.*

## CAP. QVINTVM.

**Q**Vi de officiis scripsere, in omnibus actionibus maximam tēporum ra-

DE IVRE ET OFF. BELL.

tionem habendam censuerunt, præsertim in iis, quæ in casu consistunt. unde, vt Q. Fabius Max. Q. Fabio Max. filio consuli dicebat, aliter in medio ardore belli \*, aliter in pace tranquilla arbitrandum, & agendū est. in pace enim liberè, prout æquitas & iustitia dicitur, consulendum est, & legibus insistendum: in bello autem, & turbulentis temporibus, ordinariis hisce remediis, irritantur sæpe magis, & accenduntur bella & seditiones, quàm sedantur. Unde fit plerunque, vt leges quæ in pace latæ sunt (nisi forte eæ quæ perpetuæ utilitatis causa in æternū latæ sint) bellum abroget; quæ in bello pax <sup>a</sup>. vt in naui administratione alia in secunda, vt inquit Liuius, alia in aduersa tempestate vsui sunt. Itaq; maiores nostri inquit Cicero <sup>b</sup>, semper in pace consuetudini \*, in bello utilitati paruerunt: <sup>2</sup> semper ad nouos casus temporum nouorum cōsiliorum rationes accommodarūt. & alibi <sup>c</sup>: Necessè est, inquit, in tanta concursatione perturbationum ac rerum, temporibus potius parere, quàm moribus. Qua ratione Q. Fabius Max. <sup>3</sup> parer, Classium Altiniū Arpinatem (qui clam nocte in castra Romana venerat, promit-

<sup>a</sup> *l. vn. in pr. C. de cad. tol.*

<sup>b</sup> *pro lege Manil.*

<sup>c</sup> *Philipp. ii.*

promittens si sibi præmio foret, se Arpos proditurum esse) noluit pro transfuga verberari necarique, quod aliis videbatur, quia post Cannensem cladem, tanquam cum fortuna fidē stare oporteret, ad Annibalem defecisset, traxissetque ad defectionem Arpos: & tum postquam res Romana, contra spem votaque eius, veluti resurgeret, novā refert proditionem. documentum enim statui oportere censebat Fabius, si quis respiceret, & antiquam societate respiceret, nam si abire a Romanis liceret, redire ad eos non liceret, cui dubium esset, quin brevi deserta ab sociis Romana res, foederibus Punicis omnia in Italia iuncta visura esset. non tamen fidei quicquam Altinio habendum cēsebat, sed mediam contectus cōsiliij viam, neque eum pro hoste, neque pro socio habēdum<sup>a</sup>. Item a Livius li. 24.

4 cū in maximo discrimine Nola esset<sup>+</sup>, quam non tam fiducia sui præsidij, quam volūtate principum Marcellus habebat, plebe ad defectionem spectate, quæ plurimū timebatur, & ante omnes L. Brantius iuuenis acer, quem consensus at tētatæ defectionis, ac metus a prætore Romano, nunc ad proditionem patriæ, nūc

DE IVRE ET OFF. BELL.

ad transfugiendum stimulabat: & Marcellus eum aut pœna cohibendum, aut beneficio conciliandum videret: sibi assumpsisse, quàm hosti ademisse, fortem ac strēnum maluit socium, accitumque ad se, ita comitatē sua, additis etiam præmiis, ferocis iuuenis animum emolliuit, vt nemo inde sociorum, rem Romanam fortius ac fidelius iuuerit. De ceteris verò Nolanis proditionis reis Marcellus, Annibale demum prælio victo, clausis portis quæstionem habuit. Et huc quoque spectare videtur, quod de Scipione Nasica proditum est \*. nam cum 5 Tib. Gracchus, in tribunatu profusis largitionibus, fauore populi occupato, repub. oppressam teneret, palamque dicitaret, interempto senatu, omnia per plebem agi debere, & consentientibus cunctis, vt cōsul armis repub. tueretur, Mucius Scæuola consul negaret se viquicquam esse acturum: tum Scipio Nasica: Quoniam, inquit, consul, dum iuris ordinē sequitur, id agit, vt cum omnibus legibus Romanum imperium corruat: egomet priuatus voluntati vestræ me ducem offero: & sublata dextra proclamauit: Qui repub. saluam esse volunt, me se-

- me sequantur: eaque voce, cunctatione bonorum ciuium discussa, Gracchum cum scelerata factione, quas merebatur pœnas soluere coëgit<sup>a</sup>. Hinc quoque
- 6 Cicero<sup>b</sup> laudat Octaviū \* Cæsarem, qui non expectato senatus decreto, bellum contra Antonium sua spõte susceperat. Decernendi enim tempus, vt ille ait, nõdum venerat; belli autem gerendi tēpus, si prætermisisset, videbat repub. oppressa nihil posse decerni. Silent ergo nõnquam leges\* inter arma, nec se expectari sinunt: cū ei qui expectare velit, ante pœna luenda sit, quàm iusta repetenda<sup>c</sup>. Eoque spectat, quod de C. Mario proditum est, qui cū duas cohortes Camertium, quod mira virtute vim Cimbrorū in acie sustinuisset, aduersus conditionem foederis, ciuitate donasset: excusauit factum dicendo, inter armorum strepitum, verba se iuris ciuilis exaudire nõ potuisse. erat enim id tempus, quo magis defendere, quam audire leges oportebat<sup>d</sup>. Et certè necessitas sæpe facit licitum\*, quod alioqui esset illicitum<sup>e</sup>. Ita- que clade Cannensi afflictis Romanorū viribus, eò res deducta est, vt M. Iunij dictatoris opera, spolia hostium affixa tē-

<sup>a</sup> Val Max. lib. 3. cap. 2.  
Appian. de bel. ciuil. lib. 1  
<sup>b</sup> Philipp. 8.

<sup>c</sup> Cicero pro Milone.

<sup>d</sup> Val Max. lib. 5. c. 2.  
<sup>e</sup> c. discipul. 8 de cõsec. di. 11.  
4. cap. si quis propter. ces- satus. de furt.

DE IVRE ET OFF. BELL.

plis, deorum numini consecrata, instrumenta militiæ futura, conuellerentur: ac prætextati pueri arma induerent: addictorum etiam, & capitali crimine dånatorum, atque seruorum aliquot milia (cùm ad id tempus capite censos habere milites fastidierant) conscriberentur<sup>a</sup>. Quæ si per se aspiciantur, vt inquit Val. Maximus<sup>b</sup>, aliquid ruboris habent: si autem adiunctis necessitatis viribus, ponderentur, sæuitiæ temporis conuenientia remedia videbuntur. nam vt idē ait: Cedendum fortunæ est, vbi nisi tutiora eligantur consilia, speciosa sequenti concidendum est. Sic quoque C. Mario, & Cn. Carbone cons. bello civili cum Sylla dissidentibus: quo tempore non reipubl. victoria quærebatur, sed præmiũ victoriæ res erat publica: SC.<sup>to</sup> aurea atq; argentea templorũ ornamēta, quę Numa Põpilius solēnibus deorũ sacris dicauerat, ne militibus stipendia deessent, conflata sunt, tanta fuit in summa egestate honoris publici ratio. non autē patrũ conscriptorum voluntas, vt inquit Valerius Max<sup>c</sup>. sed tua teterrima necessitas, truculenta manus illi consulto stylũ impressit. Neq; etiam dicitur fieri contra legem,

<sup>a</sup> Liu. lib. 23

<sup>b</sup> lib. 7. cap. 6

<sup>c</sup> lib. 7. cap. 6

9 legem\*, quod vrgente necessitate fit, & suadéte vtilitate publica. Supremo enim iure, quod Iuppiter sanxit, vt inquit Cicero<sup>a</sup>, omnia quæ reipub. salutaria sunt, a *Philipp. 3.* legitima & iusta habentur. Itaq; Scipio Africanus, cùm ad necessarium reipub. vsum, pecuniã ex ærario pmi opus esset: idq; quæstores, quia lex obstare videretur, aperire non auderét, protinus claus poposcit, patefactoq; ærario legé vtilitati cedere coëgit<sup>b</sup>. & Lacedæmonij, necessitati leges posthabere coacti, dixisse feruntur: Dormiãt leges hodie<sup>c</sup>. Hinc nõnulli existimãt, si subitũ & improuisum bellũ timetur, vel alias ex maxima necessitate, teneri ecclesiã ad contributionẽ.<sup>d</sup>

<sup>b</sup> Val. Max.  
lib. 3. cap. 7.

<sup>c</sup> Appian. de  
bel. punic.

<sup>d</sup> Ab. Panor.  
in o. sicut. vlt.  
de iureiur.

Ceterũ etiam q̄ ad ipsã belli administrationẽ attinet, vel maximè imperatori, vel duci exercitus, tẽpori seruiendũ  
10 est\*, & ex occasione, belli ratio cõmutanda est, & nũc impetu quodam & alacritate animi ferociter tẽporis beneficio vtẽdo: nunc cunctando & sedẽdo, cautè res geri debet. quod quia difficile est, repugnante natura, cùm non omnia eidẽ, vt inquit Liuius, dij dederint, magna cura & diligẽtia, vt ingenium tempori accõmodemus, enitendum: neque semper  
exem-

DE IVRE ET OFF. BELL.

exemplo Fabij bellum trahamus; neque exemplo Marcelli, Scipionis, & aliorū, studio pugnādi facile prælium committamus. Nam Fabius<sup>a</sup> natura cunctator, non iudicio, temporis beneficio tantam in rebus bellicis gloriā meruit: qui impetum hostis Annibalis bellicosi, & aliquot victoriis ferocis, cūm prælio facile vinci non posset, afflictiis Romanorum viribus, sedēdo fregit. sed idē naturam secutus, non tempus etiam restauratis Romanorum viribus, in eadem sentētia perstitit, & Scipioni Africam prouinciam sibi decerni petenti, cōtradicebat: cūm tamen ea sola ratio esset trahendi ex Italia Annibalem, vt euentus docuit: & Scipio si eo tempore, quo Fabius in Annibalem missus fuisset, verisimiliter nimio studio pugnæ, exemplo Flamini, & aliorum, qui Fabium præcesserant, rem Romanam amplius afflixisset. adeo difficile est ingenium & naturam mutare. Qua ratione Monarchiæ præferre solēt liberam rempub. in qua inuenias diuersissima ingenia temporibus apta. Ceterum quā plurimum imperium bello in-

<sup>a</sup> supra c. 3. utile sit, alio loco obiter ostendimus.<sup>a</sup>

Conten-

Contentiosas & lentas de rebus bellicis deliberationes admodum noxias esse, præsertim ubi facto, magis quàm consulto opus est.

- 1 *Saluberrimum in consultationibus, ut omnes vnum sentiant.*
- 2 *Tarda & læta deliberationes perniciose.*
- 3 *In rebus asperis fortissima consilia tutissima sunt.*
- 4 *Præclarum Scipionis facinus.*

## CAP. SEXTVM.

**C**VM in omnibus deliberationibus & consultationibus, tum præsertim in bellicis, saluberrimum est\*, ut vnum omnes sentiant, neque dissentione & pertinacia (quæ plerumque rem in summum discrimen deducere solent) bona consilia corrumpantur. Quod Appollonides principum vnus, Syracusanis, mortuo Hieronymo Syracusarum tyranno, maximaque inter eos orta dissensione, aliis Carthaginensium, aliis Romanorum amicitiam expetentibus, in tanta perturbatione rerum, cum non procul a seditione res esset, oratione salutari, ut in tali tempore disertè ostendisse videtur, inquit: Nec spem salutis, nec perniciè propiorè vnquam ciuitatum vlli fuisse: si enim

DE IVRE ET OFF. BELL.

si enim vno animo omnes, vel ad Ro-  
 manos, vel ad Carthaginienses inclina-  
 rent, nullius ciuitatis statum fortuna-  
 tiorem gratioresque fore: si alios aliò  
 trahat res, non inter Pœnos Romanos-  
 que bellum atrocius fore, quàm inter  
 ipsos Syracusanos: cùm intra eosdẽ mu-  
 ros, pars vnaqueq; suos exercitus, sua ar-  
 ma, suos habitura sit duces. Itaq; vt vnũ  
 omnes sentiãt, summa vi agendum esse:  
 vtra societas sit vtilior, longè minoris a-  
 deo rem momenti consultatione esse.  
 Porro quemadmodum contentiosæ hæ,  
 sic & tardæ & lentæ \*deliberationes per-  
 niciosissimæ esse solent, præsertim in bel-  
 lo, vbi non semel consilium, alioqui per  
 se tutum, & salubre, mora temerarium  
 & infoelix factum fuisse legimus. cuius  
 rei documento fuere Lanuini, qui cùm  
 deliberando tempus terunt, Latinis vi-  
 ctis demum auxilium ferre cœperunt.  
 itaque cùm iam portis prima signa &  
 pars agminis esset egressa: & nuncio al-  
 lato de clade Latinorum, cõuersis signis  
 retro in urbem redirent, prætorem eo-  
 rum Milonium dixisse ferunt, pro pau-  
 lula via, magnam mercedẽ Romanis esse  
 soluendam b. potuerãt autem Lanuini,  
 vel

a *Liv. li. 24.*

b *Liv. lib. 3.*

vel quiescendo Romanorum amicitiam  
 conseruare, vel suo tempore auxiliū fe-  
 rendo Latinis, coniunctis viribus supe-  
 riores esse. Et huc facere videtur, quod  
 Latinis ad defectionem a Romanis spe-  
 ctantibus, & decem principibus eorum  
 Romam euocatis, cōsultantibus quid ad  
 ea, quę secum actum iri crederent, respō-  
 deri placeret: Annius prætor eorum di-  
 cebat: Quanquā ipse ego (inquit) retuli,  
 quid responderi placeret: tamē magis ad  
 summam rerum nostrarū pertinere ar-  
 bitror, quid agendum nobis, quā quid  
 loquendum sit: facile esse explicatis cō-  
 filiis, accommodare rebus verba<sup>a</sup>. Nul- a Liv. lib. 8.  
 lus itaque cunctationi locus est, vt in-  
 quit Tacitus, in eo consilio, quod non  
 potest laudari, nisi per actum. & in rebus  
 3 asperis, & tenuibus\*, vt inquit Liuius,  
 fortissima quæq; consilia tutissima sunt:  
 quia si in occasionis momento, cuius  
 præteruolat opportunitas, cūctatus pau-  
 lulum fueris, nequicquā mox omissam  
 queraris. Vnde C. Cæsar, audacia &  
 magna facinora facienda, non delibe-  
 randa esse dicebat. estque in hanc rem  
 4 præclarum P. Cornelij Scipionis\* faci-  
 nus. nam cū post Cannensem cladem,  
 ij qui

DE IVRE ET OFF. BELL.

ij qui Cannusium perfugerant, ad Ap. Claudium Pulchrum, & P. Cornelium Scipionem tribunos militum, summam imperij detulissent, & iis consultantibus de summa rerum, P. Philus cōsularis viri filius, nequicquam eos consultare nunciaret, perditam spem fouere, desperatā esse repub. nobiles iuvenes quosdam, quorum princeps esset L. Cæcilius Metellus, mare ac naues spectare, vt deserta Italia ad regum aliquem confugerent: cumque tam malo nuncio omnes stu- perent, & qui aderant concilium con- uocandum censerent, negabat consilij rem esse Scipio iuuenis fatalis illius bel- li: audendum atque agendum, non con- sultandum, in tanto malo esse: irent se- cum armati, qui repub. saluam vellēt: nusquam verius, quàm vbi ea cogitaren- tur, hostium castra esse. pergit deinde ire sequētibus paucis in hospitium Metelli, & cū concilium ibi iuuenum, de qui- bus allatum erat, inuenisset, stricto super capita consultantium gladio: Ex mei a- ,, nimi sententia, inquit, iuro, vt ego rem- ,, pub. non deseram, neque alium ciuem ,, Romanum deserere patiar: si sciēs fallo, ,, tum me Iuppiter opt. max. domum, fa- ,, miliam,

miliam, remque meam, pessimo leto afficias. In hæc verba C. Cæcili iures expos-  
 ,, stulo, ceterique qui adestis : qui non iu-  
 ,, rauerit, in hunc gladium strictum esse  
 ,, sciat. haud secus pauidi, quàm si victorẽ  
 Annibalem cernerent, iurant omnes, custodiẽdosque semetipsos contra An-  
 nibalem Scipioni tradunt<sup>a</sup>. Quod certè <sup>a</sup> *Li. lib. 22*  
 facinus maiorem Scipioni gloriã peperit, quàm omnes postea acti ab eo triumphi. Non itaque cunctatione opus est, ut inquit Tacitus, ubi perniciosior est quies, quàm temeritas. quod omnium maximè in discordiis ciuilibus & rebellionibus locum habet : in quibus, ut idẽ Tacitus ait, nihil festinatione tutius, & magis facto quàm cõsulto opus est. omne enim malum nascens, ut inquit Cice-  
 ro <sup>b</sup>, agens de bello Antonio quàm pri- <sup>b</sup> *Philipp. 5.*  
 mùm inferendo, facilè opprimitur, inueteratum fit plerumque robustius. atque ita Cæsar, Gallis belli consilia renouantibus, coniurationesque faciẽtibus, magnis itineribus, repente omnibus locis occurrit, nec dabat vlli ciuitati spacium de aliena potius, quàm de domestica salute cogitandi : qua celeritate, & fideles animos retinebat, & dubitantes terrore,

S ad con-

DE IVRE ET OFF. BELL.

a *Cæsar de  
bel. gal. lib. 8.*

ad conditiones pacis adducebat, & maxima facilitate Gallorum conatus compescuit a. Quare ut est in proverbio, tempus nosse debemus: ne ut in infelicibus consiliiseuenire solet, optima videantur, ut inquit Tacitus, quorum tempus effugit, & inutili cunctatione agendi tempora consumantur.

Dum res adhuc sunt integræ, ne minimum quidem regi, vel reipubl. de maiestate sua concedendum esse: & errare eos qui arrogantiam hostium, modestia & patientia vinci posse exultant.

- 1 *Regum maiestas ubi cæpit labi, facile precipitatur.*
- 2 *Hosti non facile quid concedendum.*
- 3 *Præstat bello victum cedere regno, quàm sine certamine.*
- 4 *Patientia & modestia hostes fiunt ferociosiores.*
- 5 *Malis obuiam eundum in tempore.*
- 6 *Apologus de cane.*
- 7 *Malis conatibus hostium nunquam bellum metu concedendum.*
- 8 *Apologus de lupo, pastoribus & canibus.*

CAP. SEPTIMUM.

**N**ihil quicquã verius profectò, quàm quod Scipio Africanus Antiocho dicebat,

dicebat, monens ne conditiones pacis, quas dabat, respueret: regum scilicet  
 1 maiestatem \* difficilius ab summo fastigio ad medium trahi, quàm a mediis ad ima præcipitari<sup>a</sup>. Quare dum res adhuc  
 sunt integræ, tum reges vel respubl. secū reputare debent, quicquid de maiestate  
 2 sua cesserint \*, cum eo simul de summa rerum periclitandum esse: quod iis quibus cesserint, animum ad plura consequenda accendant; ac suis ad ea defendenda adimant, & omnibus contemptui esse incipiant. Præstat itaque pro fortuna  
 3 na \*, dignitateque, vt viro forti dignum est, quodcunque belli casus tulerit, quâdiu aliqua spes in armis est, pati, quàm singula concedendo, sine bello, tota possessione: excidere, & id de quo cōtenditur bello, omnibus ne quicquam rētatis, amittere potius est, quàm metu belli cōcedere. ita enim bello & pace quæritur, vt inquit Liuius<sup>b</sup>, vt inter omnes con-

<sup>a</sup> Liui. li. 37

<sup>b</sup> lib. 34.

DE IVRE ET OFF. BELL.

tientia\* & modestia vincere arbitramur, 4  
ferociores nobis plerunque reddamus:  
quod pulchrè ostenditur exemplo Latinorum. nam cùm Latini vna cum Campanis bellum Samnitibus inferrent, & Samnitium legati Romã missi in senatu questi essent, eadem se foederatos pati, quæ hostes essent passi, & precibus infirmis peterét, vt Latinos, Campanosque, qui sub ditione populi Romani essent, pro imperio arcerent Samniti agro, sin imperium abnuerent, armis coërcerent, & aduersus hæc anceps responsum datũ esset: quia fateri pigebat, in potestate sua Latinos iam non esse, timerentque ne arguendo abalienarent: Campanorum verò aliam conditionem esse, qui non foedere, sed per deditiõnem in fidem venissent: itaque Campanos, seu vellent, seu nollét, quieturos: in foedere Latino nihil esse, quo bellare cum quibus vellet, prohiberentur. Responsum hoc, inquit Liuius<sup>a</sup>, sicut dubios Samnites, quidnam facturum populum Romanũ censerent, dimisit: ita Campanos metu abalienauit: Latinos, veluti nihil iam concedentibus Romanis, ferociores fecit. itaque per speciẽ aduersus Samnites  
belli

<sup>a</sup> lib. 8.

belli parandi, crebra concilia indicētes,  
 omnibus cōsultationibus inter se prin-  
 cipes Romanum coquebant bellum: ad  
 quod Annius prætor hac oratione eos  
 » accendit: Si quando, inquit, vnquā con-  
 » sociandi imperij, vsurpandæ libertatis  
 » tempus optastis: en hoc tempus adest, &  
 » virtute vestra, & Deūm benignitate vo-  
 » bis datum. tentastis patientiam: negādo  
 » militem, quis dubitat exarsisse eos, cūm  
 » plus ducentorum annorum morem sol-  
 » ueremus? pertulerunt tamen hunc do-  
 » lorem: bellum nostro nomine cum Pe-  
 » lignis gessimus, qui ne nostrorum quidē  
 » finium per nos tuendorum ius antea da-  
 » bant, nihil intercesserunt. Sidicinos in  
 » fidem acceptos, Campanos ab se ad nos  
 » descisse, exercitus nos parare aduersus  
 » Samnites, foederatos suos audiuerūt, nec  
 » mouerunt se ab vrbe. vnde hæc illis tāta  
 » modestia, nisi a conscientia virium suarū  
 » & nostrarum? Atque ita Romanis tum  
 anceps cum Latinis bellum fuit, quod  
 nimia patiētia Romanorum, qua se bel-  
 lum euitaturos sperabāt, infestissimum  
 fuit: cūm alioqui, si primis conatibus  
 Latinorum obstitissent; paruo negotio  
 eos in officio continere potuissent.

DE IVRE ET OFF. BELL.

itaque Romani modestia sua euitauerūt bellum, sed distulerunt magno Latino-  
rum incommodo, in tempus, quo hostes  
omnibus rebus paratiores ad bellum es-  
sent. Præcipienda igitur sunt cogitatio-  
ne futura, & aliquando ante constituen-  
dum, quid accidere possit in vtramque  
partem, & quid agendum sit, atque ante-  
quam eueniat\*, obuiam eundem, neque  
expectandum donec obruaris, & malum  
in dies crescat, & incurabile fiat, quod in  
morbis etiam præcipiunt medici. Itaque  
Regulus quidam in Gallia, Commano  
Segoregiorum regi dixit, & affirmavit  
Massiliam (quam Senanus, cui Comma-  
nus successerat, Græcis cõdendam con-  
cesserat) aliquando exitio finitimis po-  
pulis futuram, opprimendam ergo in  
ipso ortu, ne mox validior ipsum obrue-  
ret, suasit: subnectens hanc fabulam: Ca-  
nem aliquando\* partu grauidam, locum  
a pastore precario petiisse, in quo pare-  
ret: quo obtento, iterato petiisse, vt sibi  
educare eodem loco catulos liceret: ad  
postremum adultis catulis, fultam do-  
mestico præsidio, proprietatem loci sibi  
vendicasse. non aliter Massilienses, in-  
quiens, qui nunc inquilini videantur,  
quan-

quandoque dominos regionū futuros<sup>a</sup>. <sup>a Iustini. l. 43</sup>

Si itaque bellum timetur, præstat imparatos hostes inuadere, quàm belli in præsentiarum euitandi causa, longè infestius bellum in futurum excipere. neq; enim  
 7 malis conatibus\* hostium vnquam belli metu concedendum est. nam hac ratione non tamen euitatur bellū, quàm cum maximo incommodo differtur. & sæpe etiã te bellum ostendēdo, potius pacem habiturum confidas, quàm hostium arrogantia, armis positis, concedendo. quo non tam sedatur ferocia hostium, quàm irritatur & alitur. Quò spectat quod Cicero ait<sup>b</sup>, suadens senatui, ne pacem fa- <sup>b Philipp. 7.</sup> cerent cum Antonio: Cauete per deos immortales, P. C. ne spe præsentis pacis, perpetuam pacem amittatis. Prudenter itaque Romani, Philippo, atque Antiocho occultè bellum molientibus, primi vtrò bellum intulerunt, & in Græciam bellum transferre, quàm in Italia excipere maluerunt. eoq; spectat, quod Vegetius ait: Qui pacē desiderat, præparet bellum: & quod Manlius Capitolinus dicebat: Ostendite modo bellum, pacem habebitis: videāt vos paratos ad vim, ius ipsi remittent. Salutaris enim seueritas,

DE IVRE ET OFF. BELL.

vt inquit Cicero, vincit inanē speciem clemētiæ. Quod si clementes esse voluerimus, nunquam deerunt bella ciuilia. & a epist. lib. 10 vt idem alio loco ait<sup>a</sup>: Hostibus non aliter pax dari debet (de bello ciuili agens) quàm si armis positis eam petāt: sin autē pugnantes eam postulent, victoria pax, non pactione parienda est. Quò spectat quod Mimus ait: Ignoscere humanum, vbi pudet, cui ignoscitur: alioqui verò veterem ferendo iniuriam inuitas nouā, & huc etiam referri posse videtur apologus ille a Demosthene prolatus. nam cum Alexander Macedo, sub prætextu quodam libertatis, magnam Græcię partem inuasisset, & Athenas obsideret, ex eufaret que se nō ea facere, vt libertatem eis eriperet, vrbēque in seruitutem redigeret: sed quòd decem eorum ciues infensos haberet, qui eum continuò maledictis incefferēt: proinde si pauci illi dederētur, fore vt ab obsidione decederet, populumque a bello & fame liberaret: poscebat verò in primis Demosthenem, & nouem itidem alios ciues præstantissimos: cumq; anceps esset senatus, multique acclamarent multitudini potius, quàm paucis esse consulendum: formidarēt.

daréntque pauci illi, qui ad supplicium  
 poscebantur, vixque fari auderent, quòd  
 eorum interitu reliqui omnes pacem ac  
 libertatem sperarent: ventum fuisset in  
 sententiã vt dederentur, nisi Demosthe-  
 nes huiusmodi fabella regis dolũ & in-  
 8,, sidias aperuisset. Lupus aliquando \*, in-  
 ,, quit, pastoribus, quorum diligentiam  
 ,, decipere cupiebat, persuasit, vt secum in  
 ,, amicitiam conuenirent, ea conditione,  
 ,, vt canes qui sibi infensi erant, & causas  
 ,, inimicitiarum præbebant, obsides tra-  
 ,, derentur. audiunt pastores, canesque ob  
 ,, fidem seruandæ pacis traduntur, qui o-  
 ,, uium diligentissimi custodes erant. tunc  
 ,, Lupus adempta formidine, omne pecus  
 ,, pro facietate & libidine lacerat, ac deuo-  
 ,, rat, & pastores ipsos laniat. Sic etiam in-  
 præsentiarum, inquit, viri Athenienses  
 Alexander facit: qui omnes illos, qui in  
 eius conatus concionantur, qui que eius  
 insidias pandunt, deposcit, quòd facilius  
 urbem custodibus spoliatã inuadere ac  
 diripere possit.<sup>3</sup>

a Plutar. in  
 vita Demost.

An præstet bellum domi excipere, an verò in  
 hostilem agrum inferre.

1 Scipionis sententia.

2 Q. Fabij Max. sententia.

S 5

3 Athe-

DE IVRE ET OFF. BELL.

- 3 *Atheniensibus feliciora bella fuere domi quam foris.*
- 4 *Fabula de Antreo.*
- 5 *Multum animi addit patria aspectus.*
- 6 *Agathocles cum domi obsidionem ferre non posset, tamē Africa bellum intulit.*
- 7 *Consilium Annibalis.*
- 8 *Sententia Agidis.*
- 9 *Consilium Hieronis Syracusarum regis.*
- 10 *Aliter foris, aliter domi bella tractari.*
- 11 *Melior miles extra patriam.*
- 12 *Fabij exemplum utile.*

CAP. OCTAVVM.

**F**Vit hæc quæstio variè admodum agitata a summis ducibus, multis in vtramque partem adductis argumentis & exemplis : vt vtra sententia sequenda sit, non faciliè dixeris: fuitque in senatu Romanorum olim magna hac de re cōtentio, inter Q. Fabium Max. & P. Scipionem, qui Africam prouinciam sibi decerni petebat : non aliter asserens finem belli cum Annibale fore\*, quàm si exercitus in Africam deportaretur, & eo bellum ex Italia auerteretur: referens quale esset, vltro metum inferre hosti, & ab se remoto periculo, alium in discrimen adducere:

ducere : idq; exemplo ipsius Annibalis : & multum interesse, alienos populari fines ; an proprios vri excindi que videas. plus enim animi esse inferēti periculum, quàm propulsanti : tum etiam ad dignitatem populi Romani, famam que apud reges gentes que externas pertinere, non ad defendendam modò Italiam ; sed ad inferenda etiam Africæ arma videri Romanis animum esse : castra que Romana potius esse, si Carthaginis portis imminerent, quàm Romani iterum vallum hostium ex mœnibus suis viderent : Africa esset reliqui belli sedes, illic terror fuga que, populatio agrorum, defectio sociorum, cetera belli clades. Contra ea

2 Fabius \* Annibalem recto itinere Italia prius expellendum, quàm per circuitus in Africam trahendum censebat : id que natura prius esse, tua cùm defenderis, aliena ire oppugnatum, & pacem prius in Italia optandam, quàm bellum in Africa : & vt ipsis prius decederet timor, quàm aliis inferretur : vbi nō portus vllus classi Romanæ apertus, non ciuitas socia, non rex amicus, non consistendi vsquam locus, non procedendi : quacunque circumspexeris, hostilia omnia atq; infesta :

DE IVRE ET OFF. BELL.

infesta : aliter quoque Carthaginienſes  
mœnia patriæ, templa Deûm, aras & fo-  
cos deſenſuros, quàm Hispaniam defen-  
derant : vbi Annibal eſſet, ibi caput atque  
arcem illius belli eſſe : quem in Africam  
tractum propinqua Carthago, & tota  
ſocia Africa potentiorem armis viriſque  
a *Liv. li. 28.* faceret<sup>a</sup>. Et pro Fabio quoque facit exē-  
plum Athenienſium<sup>\*</sup>, qui quoad domi 3  
bella geſſerunt, victores ſemper exſtite-  
runt : ſed magna claſſe in Siciliam tranſ-  
miſſa, vna nauali pugna florentem rem-  
pub. ſuam in perpetuum affligerunt. fac-  
cit quoque quod de Antæo<sup>\*</sup> Lybiæ re- 4  
ge fertur : qui ab Hercule Ægyptio, dum  
in ſedibus ſuis bellum geſſit, ſuperari nō  
potuit : fraude verò Herculis, extra fines  
ſuos tractus, cæſus fuit, & vitam cum  
regno amiſit. quod fecit locum fabulæ,  
quæ fingit Antæum Neptuni e Terra fi-  
lium fuiſſe, robore & fortitudine ne-  
mini cedentem : cuius membra quotiēs  
labore deſecta eſſent, tactu Terræ matris  
ſuæ recreabantur : quem Hercules cum  
eo pugnans, medium complexus, quòd  
aliter ſuperari non poſſet, e terra ſubla-  
tum, aſtrictum pectori expirare coë-  
git<sup>b</sup>. Thomyris quoque Scytarum re-  
gina,

<sup>a</sup> *Liv. de  
bel. cum lib. 4*

<sup>b</sup> *Liv. de  
bel. cum lib. 4*

gina, nequaquam Cyri aduentu territa, maluit aduentum eius operiri, quàm obuiam ire, feliciorem sibi pugnam intra regni sui terminos futuram rata, vbi Cyrum in angustias pertractum ex insidiis cum ducentis millibus Persarum trucidauit <sup>a</sup>. Item Lacedæmonius <sup>a Iust. l. 1.</sup> bella aduersus finitimos gerentibus, cum Thebani Epaminonda duce, occupandæ vrbis eorum spem cepissent, tacitiq; Lacedæmona proficiscerentur: non amplius centum iam effœtæ ætatis viri, qui domi manserant, aduersus quindecim millia militum pugnæ sese obtulerunt. tantum animorum viriumque patriæ & penatum conspectus subministrat\*, tantoque præsentia, quàm recordatione sui maiores spiritus largitur, inquit Iust.<sup>b</sup> nã cum viderent, intra que, & <sup>b lib. 6.</sup> pro quibus starêt, aut vincendũ sibi, aut moriendum censuerunt. Et huc spectare videtur consiliũ T. Quintij Flaminij cõs: quo Achæos bellum inferre Zacyntho molientes, monuit, ne instar testudinis (que vbi collecta in suũ tegmẽ est, tuta ad omnes ictus est; vbi exierit aliquas partes, quodcũq; nudauit, obnoxium atq; infirmũ habet) prolato extra Peloponesũ capite, peri-

DE IVRE ET OFF. BELL.

<sup>a</sup> *Li. lib. 36.* <sup>Pintar. in A. poph.</sup> periculo sese exponerēt<sup>a</sup>. Pro Scipione verò facit ipse euentus belli, quo Annibalem (qui tredecim annis in Italia impunè bellum gesserat) tractum in Africā superavit, & præclara victoria potitus est. Similiter Agathocles tyrānus\*, cūm <sup>6</sup> Poeni Syracusas obsidione cinxissent, & sese nec viribus parem, nec ad obsidionē ferēdam instructum videret: mira prorsus audacia (vt qui sua tueri non poterat, impugnaret aliena) bellum in Africam transtulit, & castra quinto lapide a Carthagine posuit: & Hannone Pœnorum duce superato, vastata Africa, plurimas & nobilissimas vrbes, amicitiarum iura non fide, sed successu ponderātes, a Pœnis deficientes, ad se pellexit<sup>b</sup>. Facit quoque pro Scipione cōsiliū Annibalis\*, <sup>7</sup> quo cum ipse primū in Italia per tredecim annos cum maximā gloriā bellū gessit: tum etiam Antiocho consilia volutanti de Romano bello, auctor fuit, vt in Italia bellum gereret: Italiam & milites, & comeatum præbituram externo hosti: in Italia Romanos, suis opibus, suis viribus, suis armis vinci posse: si nihil ibi moueatur, licerētq; populo Rom. viribus & copiis Italiæ, extra Italiā bellum ge-

lum gerere, neque regem, neque gētem  
 vllam parē Romanis fore<sup>a</sup>. & hæc quo- <sup>a</sup> *Liui. lib. 34*  
 que fuit sentētia Agidis Lacedæmonio-  
 rum regis\*, qui dicebat Ætolis intra fi-  
 nes suos bellum inferendum, nec per-  
 mittendum, vt Peloponnesi claustra in-  
 trarent<sup>b</sup>. Idem consilium post cēdem C. <sup>b</sup> *Plut. in vitā*  
 Flamini, exercitusque Romani ad Tra- <sup>c</sup> *ta Agidi.*  
 s ymenum, populo Romano dedit Hie-  
 ro Syracusarū rex\*, amicus populi Rom.  
 vt scilicet prætor, cui Sicilia prouincia  
 euenisset, classē in Africam trajiceret,  
 vt hostes in terra sua bellum haberent,  
 minusque laxamēti daretur iis, ad auxi-  
 lia Annibali submittenda<sup>c</sup>. Hoc quoq; <sup>c</sup> *Liui. lib. 22*  
 consilio senatus populusque Rom. Ma-  
 cedonicum bellum indixit, persuadente  
 Seruio Sulpitio conf. cui Macedonia  
 prouincia euenerat: qui populo, vt ro-  
 gationem de bello Macedonico indicē-  
 do iuberent, his rationibus suasit: non  
 hoc agi, vtrum bellum, an pacem habē-  
 rent Romani (neque id liberum iis per-  
 missurum Philippum, qui terra marique  
 ingens bellum moliretur) sed vtrum in  
 Macedoniam legiones transportarēt, an  
 hostes in Italia acciperent. Hoc quātum  
 interesset, Punico proximo bello exper-  
 tos esse.

DE IVRE ET OFF. BELL.

tos esse. quis enim dubitaret, quin si Saguntinis obsessis fidem Romanorum implorantibus impigrè tulissent opem, sicut patres ipsorum Mamertinis tulerant, totum in Hispaniam auersuri bellum fuissent: quod cunctando cum magna clade Romanorum in Italia acceperunt. Nec illud quidem dubium esse, quin Philippum pactum iam per legatos, literasque cum Annibale, in Italiã trajicere, misso cum classe Leuino, qui ultra ei bellum inferret in Macedonia, continuissent. multo magis florentem Italiam, multo magis integras res, saluis tot ducibus, saluis tot exercitibus, quos Punicum postea bellũ absumpsit, aggressum Pyrrhum, tamen cõcussisse, & victorem prope ad ipsam urbem Romam venisse: nec Tarentinos modò, orãque illam Italiã, quam maiorem Græciam vocant, sed etiam Lucanos, & Brutios, & Samnites ab ipsis defecisse: quæ quoque, si Philippus in Italiam transmissurus esset, quietura, aut mansura in fide non esse: quemadmodum nec bello Punico manserunt. si piguisset Romanos in Africam trajicere, etiamnum tunc in Italia Annibalẽ futurum fuisse, & Carthaginiẽses hostes habi-

habituros. potius igitur esse, ut Macedo-  
 nia, quàm Italia bellum haberet, ho-  
 stium vrbes agrosque ferro & igni vasta-  
 ri: expertos iam esse, foris ipsis, quàm  
 domi feliciora potentioraq; arma esse<sup>a</sup>. a Liu. lib. 31.  
 Ex quibus certè constat, id quod Aga-  
 10 thocles quoque dicebat: Aliter foris\*; a-  
 liter domi bella tractari: domi ea sola  
 auxilia esse, quæ patriæ vires submini-  
 strent: foris hostem etiam suis viribus  
 vinci. His adde, quòd melior procul  
 11 a domo futurus sit miles\*, vbi nullum  
 est refugium, & necessitas pugnandi  
 imminet. qua ratione Annibal in Hi-  
 spania bellum gerens, Afriam Hispa-  
 norum præsidio firmavit: & pro eo sup-  
 plementum ipse ex Africa petiit<sup>b</sup>. b Liu. lib. 10  
 Sed & tanto audacius, fortiusque pugna-  
 turus est miles in hostili agro, quanto  
 maior spes, maiorque animus inferen-  
 tis est bellum, quàm arcentis. huc ac-  
 cedit, quòd hostes denicti, extra fines  
 suos, facilè restaurare bellum possint,  
 & fines suos tueri: vbi si domi suæ ho-  
 stes superaueris, nullo spacio recrean-  
 di dato, facilè eos opprimere possis, &  
 bello finem imponere. quod Annibali  
 victori ad Cannas non difficile fuisset,  
 T si victo-

DE IVRE ET OFF. BELL.

si victoria & beneficio fortunæ vsus fuisse: & satis constat moram tantum suam salutem vrbi atq; imperio Romano fuisse.<sup>a</sup>  
<sup>a</sup> *Liv. lib. 22* Et his quidem argumentis, & exemplis in medium prolatis, unicuique liberum hac de re constituendi relinquimus arbitrium, illud tamen etiam atque etiam pensandum est, si de bello inferendo, vel excipiendo consultetur, an facilis sit accessus in fines hostium, an arcibus muniti, an plani campi, an loca montuosa, ubi insidiæ timeri possent, an cum hoste armato & bellicoso; an verò inermi & imbelli, & cuius vis omnis in pecunia consistat, res sit: qui suis viribus domi sue facile superari poterit, exemplo Cai thaginiensium: secus si cum hoste armato, & bellicoso, cui domi omnia ad bellum parata sunt, quales fuere Romani, res sit. Ceterum si cum hoste bellicoso & vincere solito domi tuæ bellandum erit, non inutile videbitur Fabij exemplum sequi<sup>r</sup>,<sup>12</sup> qui Annibalē iam aliquot victoriis ferocem, cum facilè certamine vinci non posse videret, sedendo fregit, & vincere Annibalem prohibuit, ut ab aliis vinei posset: satis cito incipi victoriam ratus, ubi prouisum foret ne vinceret: qua ratione

.tione imperium Romanum multis cla-  
 dibus afflictum restituit. Suntque præ-  
 clara in hanc sententiam eiusdem Fabij  
 verba, quibus L. Æmilius Paulus con-  
 tra Annibalem euntem ita affatus est :  
 „ Vna ratio belli gerendi aduersus Anni-  
 „ balem est, qua ego gessi, nec euentus mo-  
 „ dò hoc docet : stultorū iste magister est :  
 „ sed eedem ratio quæ fuit, futuraque, do-  
 „ nec res eadē manebunt, immutabilis est.  
 „ in Italia bellum gerimus, in sede ac solo  
 „ nostro, omnia circa ciuium ac sociorum  
 „ sunt : armis, viris, equis, cōmeatibus iu-  
 „ uant iuuabuntque. id iam fidei documē-  
 „ tum, in aduersis rebus nostris dederunt.  
 „ Meliores, prudentiores, constantiores,  
 „ nos tempus diesque facit. Annibal con-  
 „ trà, in aliena, in hostili terra, inter omnia  
 „ inimica infestaque, procul a domo, pro-  
 „ cul a patria, neque illi terra, neque mari  
 „ est pax: nullæ eum vrbes excipiunt, nulla  
 „ moenia, nihil vsquam sui videt. in diem  
 „ rapto viuit, partem vix tertiam exerci-  
 „ tus eius habet, quem Iberum annē tra-  
 „ iecit: plures fames quàm ferrum absum-  
 „ psit: nec his paucis iam victū suppeditat.  
 „ Dubitas ergo quin eum sedendo supera-  
 „ turi sumus, qui senescat in dies? non cō-

DE IVRE ET OFF: BELL.

meatus, non supplementum, non pecuniam habeat <sup>a</sup>? Et certè eò Annibalem tunc redactum fuisse constat, vt nullo negotio superari potuisset, nisi temeritas Terētij Varronis occasionem rei bene gerendæ hosti præbuisset. Simili ratione Cn. Sulpitius dictator, aduersus Gallos in Italia bellum trahebat, nolens se committere fortunæ aduersus hostem, quem tempus deteriolem in dies & locus faceret: sine præparato comœatu, sine firmo munimento morantem: ad hoc iis animis corporibusque, quorum omnis in impetu vis esset, parua eadem languescere mora <sup>b</sup>.

An præstet initio prælij magno clamore, & concitato cursu in hostes pergere; an verò loco manere, & hostium impetum excipere.

- 1 *Leuissima quæque in bello nonnunquam magni momenti sunt.*
- 2 *Samnites & Galli primo impetu feroces.*
- 3 *Fabius sustinuit impetum hostium & vicit.*
- 4 *Decius impetum faciendo in hostem uictus fuit.*
- 5 *Faby exemplum secutus T. Veturius.*
- 6 *A. Cornelius Cossus dictator hostium impetum excipiendo vicit.*

7. *Cæsar*

- 7 *Cæsar reprehendit consilium Pompeij, qui prædixerat isuis, ut impetum Cæsaris exciperent.*
- 8 *Mos Gallorum & Germanorum initio prælij.*
- 9 *Syri ex clamore indicium sumebant de futura victoria vel clade.*
- 10 *Cyri consilium.*

## CAP. NONVM.

1 **I**N bello nihil tam leue est\*, quod non magnæ interdum rei momentū faciat. cuius nobis fidem faciunt Q. Fabius, & P. Decius consf. bello contra Samnites & Hetruscos. instructa enim acie, ita vt Fabius aduersus Samnites in dextro cornu, & Decius aduersus Gallos in sinistro cornu cōsisteret, haud similis pugna, inquit Liuius<sup>a</sup>, in dextro læuoque cornu <sup>a lib. 10.</sup> fuit. Romani apud Fabium arcebāt magis, quàm inferebant pugnam, extrahebantq; in quàm maximè serum diei certamen: quia ita persuasum erat duci, &

2 **S**ānites & Gallos\* primo impetu feroces esse, quo sustineri satis sit: longiore certamine sensim residere Samnitium animos: Gallorum quidē etiam corpora intolerātissima laboris atq; æstus fluere,

DE IVRE ET OFF. BELL.

primaque eorum prælia plus quam virorum; postrema minus quam feminarum esse. in id tempus igitur, quo vinci solebat hostis, quam integerrimas vires militi seruabat Fabius\*. Ferocior De- 3  
cius, & ætate & vigore animi, quantum-  
cunq; virium habuit, certamine primo  
effudit\*, impetum faciendo in hostem: 4  
quod illi non bene cessit: nam sui milites,  
primo cōflictu in fugam acti sunt, & dis-  
sipati: quos cum nulla vi sustinere pos-  
set, ut morte sua eam, quam per victoriã  
consequi non poterat gloriam, sibi para-  
ret, exemplo P. Decij patris, se legiones-  
que hostium pro exercitu populi Rom.  
quiritum deuouit: & quã cōfertissima  
cernebat Gallorum aciem, concitauit e-  
quum, interensque se ipse infestis re-  
interfectus est: & Romani amisso duce,  
quæ res terrori alias esse solet, sistere fu-  
gam, ac nouam de integro instaurare pu-  
gnam cœperunt: quibus cum superue-  
nissent subsidia ex nouissima acie iussu  
Fabij ad præsidium collegæ missi, victoria  
potiri sunt. Et Fabij exemplum secutus  
T. Vetulus cōf.\* in Volscos missus, cum  
ad dimicandum hostes acie exciuisset. &  
multitudine aliquantulum Volsci supe-  
rarent:

rarent: nec promouit aciem, nec clamorem reddi passus est, sed defixis pilis stare suos iussit: vbi ad manū venisset hostis, tum cohortes tota vi gladiis rem gererent: in quo genere pugnæ Mars est atrocissimus. Volsci cursu & clamore fessi, cum se velut stupentibus metu intulissent Romanis, postquam impressionē sensere ex aduerso factam, & ante oculos micare gladios, haud secus quàm si in insidias incidissent, turbati verterūt terga, & ne ad fugam quidem satis virium fuit: quia cursu in prælium ierant. Romani contrà quia principio pugnæ quieti steterant, vigentes corporibus, facilè adepti fessos, & castra impetu ceperūt, & castris exutum hostem, Velitras persecuti, vno agmine victores cum victis irrupere <sup>a</sup>. a Liv. li. 2

6 Similiter A. Cornelius Cossus dictator\*, acie decertaturus cum Volscis, quorum ingens erat exercitus, milites suos ita affatus est: Nostra victoria est milites, si  
 „ quid dii vatesque eorum in futurum vident. itaque vt decet certę spei plenos, &  
 „ cum imparibus manus conferturos pilis ante pedes positis, gladiis tantum de-  
 „ xtras armemus: nec procurfari quidem  
 „ ab acie velim, sed obnixos vos stabili

DE IVRE ET OFF. BELL.

gradu impetum hostium excipere : vbi  
illi vana iniecerint missilia, & effusi stan-  
tibus vobis se intulerint, tum micēt gla-  
dij, & veniat in mentem vnicuique deos  
esse, qui Romanum adiuuent, deos qui  
secundis auibus in prælium miserint. &  
sic vt præceperat pugnant, nec dux le-  
giones, nec fortuna fefellit ducē<sup>a</sup>. Hoc  
quoque consilio Pompeius, prælio de-  
certaturus cum Cæsare ad Pharsalū, suis  
prædixerat, vt Cæsaris impetum excipe-  
rent, néue se loco mouerent, aciemque  
eius distrahi paterentur : idq; admonitu  
C. Triarij fecisse dicitur, vt primus ex-  
cursus, visque militum infringeretur, a-  
ciesque distenderetur : leuiusque casura  
pila sperabat, in loco retentis militibus,  
quàm si ipsi immixtis telis occurrissent:  
simul fore, vt duplicato cursu, Cæsaris  
milites examinarentur, & lassitudine cō-  
ficerentur: quod Cæsari tamen nullo cō-  
silio factum videbatur\* : propterea quòd  
est quædam animi incitatio, atque ala-  
critas naturaliter innata omnibus, quæ  
studio pugnæ incenditur : hanc non re-  
primere, sed augere imperatores debere,  
neque frustra antiquitus institutum esse,  
vt signa vndique concinerent, clamo-  
remque

remque vniuersi tollerent : quibus re-  
 bus & hostes terreri, & suos incitari exi-  
 8 stimauerunt<sup>a</sup>. Sic Galli & Germani\*, qui-<sup>a</sup> *Ces. de bel. civil. lib. 3.*  
 bus inconsulta ira & furor erat, si quâdo  
 cum hoste congredi pararent, dissono &  
 truci cantu, quem harritum vocabant,  
 cum ululatu & tripudiis scuta quatien-  
 tes, prælium inibant, ex quo futuræ pu-  
 gnæ fortunam augurabantur. Similiter  
 9 Syri\* primo congressu, Solem venerati,  
 cum classico signo dato pugnam inirent,  
 primo occurso ad ardorem excitandum,  
 ardentissimo clamore concurrebant, &  
 signa inferebant : qui si consona voce  
 editus, neque impar, varius, vel dis-  
 sonus foret, haud dubiè fatis animo-  
 rum ad certamen esse, & futuram victo-  
 riam spondebant. nam is erat index vo-  
 luntatis & animi cuiusque : si verò ex-  
 citatior crebriorque ab hoste sublatus  
 esset : quò euentus prælij casurus fo-  
 ret, indicium haud dubiè præbebat.  
 Quò spectat quod Liuius<sup>b</sup> refert, in-<sup>b</sup> *lib. 4.*  
 cautè, inconsulteque a C. Sempro-  
 nio consule prælium commissum cum  
 10 Volscis : Clamor, inquit, indicium pri-  
 11 mum fuit, quò res inclinatura esset,  
 12 excitatior crebriorque ab hoste subla-

DE IVRE ET OFF. BELL.

tus: ab Romanis dissonus, impar, segnis, sæpe iteratus incerto clamore prodidit pauorem animorum. Cyri verò consiliū fuit\*, vt si hostes tumultuosius irruerēt, taciti milites impetum exciperent: sin autē taciturni, clamore & strepitu acies inuaderent<sup>a</sup>. Plurimum certè refert, vtrum cum tyronibus, & militiae insuetis, qui faciliè inusitato clamore, & imprefione commoueri possint, an verò cum veteranis & bello assuetis, qui non faciliè terreri solent, res sit.

<sup>a</sup> Alex. ab Alex. genial. dier. l. 4. c. 7.

Non esse consilij, inuicem infensos ciuilibus dissensionibus hostes, sola discordia fretum inuadere.

- 1 *Seditio reip. alioqui aeternam, mortalem facit.*
- 2 *Fouenda seditiones hostium.*
- 3 *Hostes dissentientes non sunt inuadendi.*

CAP. DECIMUM.

**Æ**Ternam esse magnam reipub.\* nisi ciues inter semetipsos seditionibus sæuiant: id vnum venenum, eam labem ciuitatibus opulētis repertam, vt magna imperia mortalia essent, non temerè ab antiquis creditum est, cuius rei exemplo esse

esse potest Romana resp. quæ tam diu imperium totius orbis tenuit, donec ciuilibus, & intestinis bellis, suis viribus consumpta, & ad nihilum redacta est. Vnde solent prudentes duces fouere se-  
 2 ditiones hostium\*, si quando possent: vt hac ratione incruenta victoria, hostium viribus potiri possent. Quo cõsilio Marcus Coriolanus, victor ad urbem pergens, cum agrum Romanum popularetur, a Patriciorum agris abstinere iussit, quod illos suspectos plebeiis redderet, & discordiam ciuium iam ante natam incitaret<sup>a</sup>. Et Annibal cum videret Q. Fabium solerti cunctatione illi victoriam præripere, qui bellum ratione, non fortuna gereret: quo nomine contemptus erat Romanis, & timidus dictus, ad augendam Fabij inuidiam ab agro ipsius omnem vim hostilem abstinere iussit, omnibus circa solo æquatis, vt occulti alicuius pacti ea merces videri posset<sup>b</sup>. Quam inuidiam vt euitaret Fabius, fertur agros illos vendidisse, & precium in redemptionem captiuorum conuertisse: Periclem imitatus, cuius agros in populatione ceterorum Spartani intactos reliquerat, sperantes acquirere se illi posse, aut periculum  
 ex in-

<sup>a</sup> Liv. lib. 1.  
 Dion. t. 1.  
 lib. 8.

<sup>b</sup> Liv. lib. 22.

DE IVRE ET OFF. BELL.

ex inuidia, aut ex suspitione proditiōnis infamiā: quod ante perspiciens Pericles, & futurū populo prædixerat, ad inuidiæ imperum declinandū: agros ipsos dono reipub. dederat, atque ita vnde periculū quæsitum fuerat, ibi maximam gloriam inuenit<sup>a</sup>. Porro non erit consultum seditiosos hostes \*, sola discordiæ fiducia <sup>3</sup> inuadere. Nā externus timor, vt inquit Liuius, optimum concordiæ vinculum. Itaque cū Prænestini, ex discordia Romanorum, occasionem sibi dari rati, raptim agmine factō peruaſtatis protinus agris, ad portā Collinam signa inferrēt: ingensque in vrbe, trepidatio esset: conclamatum ad arma, concursumq; in muros atque portas est: tandemque ab seditione ad bellum versi, dictatōrē T. Quintium Cincinnatum creauere. quod vbi auditum est (tantus eius magistratus terror erat) simul hostes a mœnibus recessere, & iuniores Romani ad edictum sine detrectatione conuenere<sup>b</sup>. ciuilia enim certamina terror externus cohibet. Sicque cū Cæsar Britannis bellū inferret, summam imperij belli que administrandi Britanni communi consilio permiserūt Cassinellauno, cui cum reliquis ciuitatibus

<sup>a</sup> *Liuius, l. 3.*

<sup>b</sup> *Liuius, lib. 6.*

bus continentia bella intercesserant: sed aduētū Cæsaris permoti, eum toti bello imperioq; præfecerunt<sup>a</sup>. Similiter Veientino bello, Cn. Manlio, & M. Fabio consules, cum ciuilibus dissensionibus exasperatis militum animis, consules castris se tenerent, nec prælio rem committere auderent: quòd arma militi non crederēt: & his freti hostes, omnibus modis lacefferent ad pugnam Romanos, probraingerentes, & Romanis insultantes: Romanus non vltra contumeliam pati potuit; cumq; externa & domestica odia certarent in animis, tandem superabant externa: adeo superbè insolenterq; hostis illudebat. itaque acie instructa, irritatis in hostem, & sibi inuicem reconciliatis militum animis, non alie ante bello, inquit Liuius<sup>b</sup>, infestior Romanus prælium iniit. cum sise continuissent hostes, propriis ipsorum viribus, & suo milite facilè Romanos superare potuissent: vt exemplo sunt Æqui & Volsci: inter quos agrum Romanum ingressos ex certamine Volsci, Æquie imperatorem coniuncto exercitui darent, seditio deinde atrox, prælium ortum, & inuicem hostes pernicioso

<sup>a</sup> Cæs. de bel. gal. lib. 5.

<sup>b</sup> lib. 2.

DE IVRE ET OFF. BELL.

nicioſo & pertinaci certamine ſe con-  
fecerunt, & Romanis victoriam tradi-  
derunt<sup>a</sup>. Prudenter itaque Scorio Da-  
corum dux, cùm ſciret ciuilibus armis  
diſtineri populum Ro. non tamen occa-  
ſione inde arrepta laceſſendum arbitra-  
batur, proſpiciens externo bello inteſti-  
num plerumque reſtingui: & ſuorum a-  
nimos, qui ſtudio pugnæ ardebāt, lepidè  
repreſſit, reprehenditque: canes ſiquidè  
duos iſſis inſpectantibus commiſit: iſſ-  
que mox acriter pugnātibus, lupum in-  
geſſit: quem canes, omiſſa protinuſ inter  
ſe ira, communem hoſtem alacriter in-  
uadentes confecere.<sup>b</sup>

<sup>a</sup> *Lin. lib. 2.  
Dion. Hal.  
lib. 8.*

<sup>b</sup> *Cæſ. Rho-  
dy. lect. an-  
tig. l. 9. c. 50.*

Necelſitatem pugnaudi magno ſtudio impo-  
nendam militibus eſſe, & hoſtibus remit-  
tendam.

- 1 *Viſ neceſſitatis.*
- 2 *Milites neceſſitate ad certamè cōpellendi.*
- 3 *Fuga ſpecificis omnibus modis adimēda mi-  
litibus.*
- 4 *Neceſſitas pugnandi hoſtibus remittēda.*
- 5 *Hoſtibus aperienda via, qua fugiant.*

CAP. VNDECIMVM.

**Q**uanta ſit viſ neceſſitatis\*, a Philo- 1  
ſophis abundè ſatis diſceptatum eſt,  
qui

qui ex necessitate omnia fieri contendunt. Itaque Thales interrogatus quid validissimum esset, respondit necessitas: eam enim solâ superari non posse. Cuius vi ac virtute cognita, & quantum cùm in reliquis omnibus actionibus, tũ præcipuè in bello posset, quâ tum animi adderet, considerantes summi duces, solent hoc studiosè agere, vt milites suos necessitate astringerèt ad certamen\*. nam, vt inquit Q. Curtius, necessitas ante rationem est, maximè in bello. Atq; ita Q. Fabius dictator, cùm per aliquot dies, post ancipitem pugnâ cum Samnitibus, cõtinuisset suos intra vallum, obsessi magis quàm obsidentis modò, signum repente pugnæ proposuit: & efficacius ratus ad accendendos virorum fortium animos, nullam alibi, quàm in semetipso cuiquam relictam spem, de C. Fabio magistro equitum, nouo què exercitu, qui Roma aduenerat, militem celauit, & tanquam nulla nisi in eruptione spes esset, locorum angustias, & com meatus inopiam, militibus exposuit: & nisi quam victoria patefacerent, viam nullam habere: castra quoque, ne infecta victoria, sicut pristino die, in ea se reciperent, incendi

DE IVRE ET OFF. BELL.

cendi iussit: armis munimenta, non munimentis arma tuta esse debere inquires. itaque oratione dictatoris, quæ necessitatis index erat, accensi milites, ibant in hostem: & respectus ipse ardentium castrorum haud paruum erat irritamentum ad victoriam <sup>a</sup>. Sic quoque M. Portius Cato in Hispania bellum gerens, circumducto exercitu, procul a navibus suis castrisque, ubi spem nisi in virtute haberet, inter medios hostes prælium commisit, hac exhortatione usus ad suos: Nusquam nisi in virtute spes est milites; & ego sedulo ne esset feci. inter castra nostra & nos, medij hostes, & a tergo hostium agger est. quod pulcherrimum, idem tutissimum, in virtute spem positam habere <sup>b</sup>. Et Annibal superatis Alpibus, cum P. Scipione dimicaturus, necessitatem pugnandi suis exposuit, inquiens: Dextra lævaque duo maria claudunt: nullam ne ad effugium quidem navem habemus: circa Padus amnis, maior ac violentior Rhodano: a tergo alpes vrgent, vix integris vobis ac vigentibus transitæ. hic vobis vincendum, aut moriendum milites est, ubi primum hosti occurristis: & eadē fortuna, quæ necessitatem pugnandi imposuit,

„ posuit, præmia vobis ea victoribus pro-  
 „ posuit, quibus ampliora homines ne a  
 „ diis quidem immortalibus optare solēt.  
 „ Duos consules huius anni, vnum in A-  
 „ fricam, alterum in Hispaniam Romani  
 „ misere: nihil vsquam nobis relictum est,  
 „ nisi quod armis vindicauerimus, illis ti-  
 „ midis & ignauis licet esse, qui receptum  
 „ habent, quos suus ager, quos sua terra,  
 „ per tuta, per pacata itinera, fugientes ac-  
 „ cipient: vobis necesse est, fortibus viris  
 „ esse, & omnibus inter victoriam mor-  
 „ témue certa desperatione abruptis, aut  
 „ vincere, aut si fortuna mutabit, in prælio  
 „ potius, quàm in fuga mortem oppetere.  
 „ Si hoc bene fixū omnibus, destinatum-  
 „ que in animo est, iterum dicam vicistis.  
 „ Nullum incitamentum ad vincendum,  
 „ inquit Liuius<sup>a</sup>, homini a diis immorta- a lib. 21.  
 „ libus acrius datū est. Item Vectius Mes-  
 „ sius Volscorum dux, cum videret suos in  
 „ medio circumuentos a Romanis, eos in-  
 „ crepans clara voce: Hic perituri, inquit,  
 „ vos telis hostium estis, indefensi, inulti?  
 „ quid igitur arma habetis? aut quid vltro  
 „ bellum intulistis, in otio tumultuosi, in  
 „ bello segnes? Quid hic stâtibus spei est?  
 „ an deum aliquem protecturum vos, ra-  
 „ pturum-

DE IVRE ET OFF. BELL.

pturumque huic putatis? ferro via facie-  
 da est. hac qua me progressum videtis, a-  
 gite, qui visuri domos, parentes, coniu-  
 ges, liberose estis: ite mecum. non murus,  
 nec vallum, sed armati armatis obstant,  
 virtute pares, necessitate, quæ vltimum  
 ac maximum telum est, superiores estis.  
 Porro vt necessitatem militibus impo-  
 nerent summi duces, solēt variis modis,  
 fugæ spem adimere\*. itaque Cæsar pri-  
 mum suo, deinde omnium e conspectu  
 remotis equis, vt æquato omnium peri-  
 culo, spem fugæ tolleret, cohortatus suos  
 prælium commisit cum Heluetiis<sup>b</sup>. idq;  
 apud Germanos frequens fuit. Agathoc-  
 les tyrannus cum in Africâ traiecisset,  
 omnes naues consentiente exercitu in-  
 cendi iussit: vt omnes scirēt auxilio fugæ  
 adempto, aut vincendum, aut moriendū  
 esse<sup>c</sup>. Astyages Medorum rex cum Cyro  
 & Persis prælio decertans, pugnantis  
 suis partem exercitus a tergo posuit, &  
 in tergiuersantes ferro agi, vt in hostes  
 iussit: ac suis denunciari, ni vincerent, nō  
 minus fortes etiam post terga inuentu-  
 ros, quàm a fronte viros: atque ingens  
 ex necessitate, pugnandi animus militi-  
 bus accessit<sup>d</sup>. Et fuit apud Romanos fre-  
 quens,

<sup>a</sup> *Liv. lib. 4.*

<sup>b</sup> *Cæs. de bel. gal. lib. 10.*

<sup>c</sup> *Iust. l. 22.*

<sup>d</sup> *Iust. l. 1.*

quens, vt fugientes pro hostibus cædi iuberentur : profuitque sæpius salubre consiliū, quod in magna cōsternatione, abscissis rebus, ac desperata salute, a Romanis factitatum legimus : vt dispositis equitū turmis ante munimenta, fugientes temerè ex prælio ad castra, pro hoste haberent; illosque strictis gladiis inuaderent, vt non minus a tergo, quàm a fronte infestas acies viderét. Hæc vltima desperatio nonnunquam militū animos ita incendit, vt inclinatas, & turpi fuga profligatas acies plerumque repararit : tantoque ardore pugna fuerit restituta, vt milites ancipiti coacti metu, victoriã ex hostium manibus sæpe eripuerint.

Ceterum eadem ratio, quæ necessitatem pugnandi militibus imponendã suadet, eandem hostibus remittendam \* esse ostendit. fit enim plerumque, vt desperatio in virtutem conuertatur, secundum illud Maronis,

*Vna salus victis nullam sperare salutem.*

Itaque bello Veienti, cum hostes ex prælio subtractis subsidiis ad castra Romana oppugnanda iuissent, & Cn. Manlius cōsul euectus in castra, ad omnes portas milite opposito, hostibus viã clausisset:

DE IVRE ET OFF. BELL.

hæc desperatio hostibus rabiem magis quam audaciam accendit: ita ut cæso cōsule, vis hostium amplius sustineri non posset, & ad extrema ventum foret, nisi legati patefecissent vna porta hostibus viam, qua erumperent<sup>a</sup>. Quare meritò Scipionis sentētia laudata fuit, qui viam hostibus, qua fugerent, esse muniendam dicebat\*. Quanto enim plus spei, ut in- 5 quit Tacitus, tanto minor ad resistēdum animus erit: nam ignauiam quoque necessitas acuit, & sæpe desperatio spei causa est: aut saltem, ut Q. Curtius ait, magnum ad honestè moriendū incitamentum. Vnde prudenter Themistocles, Græcis volentibus Xerxis prælio victi transitum impedire, ipsumque regem cum exercitu intercludere, timens ne interclusi hostes desperationem in virtutē verterent, & iter quod aliter nō pateret, ferro patefacerent, cum vincere ceteros consilio non posset, per seruum Xerxem monuit, ut maturata fuga, transitum occuparet<sup>b</sup>. Prudenter quoque M. Furius Camillus dictator, cum Veios oppugneret, & cuniculo per Veientanam arcem acto, per quē electos milites immiserat, urbem suis militibus impleffet, & omnibus

<sup>a</sup> Liv. lib. 2.  
Dion. Hal.  
lib. 9.

<sup>b</sup> Liv. lib. 2.

bus locis pugnaretur, multa iam edita cæde, quo facilius vrbe potiretur, necessitate defendendi hostibus remissa, edicere per præcones iussit, vt ab inermi abstineretur: quo factum est, vt finis sanguinis esset, & dedi inermes inciperent. <sup>a Liu. lib. 5.</sup> Similiter cùm Fregellæ Colonia, nec opinato aduentu Samnitium, nocte occupata esset, & Fregellani pugnam aliquã diu æquam (quòd pro aris & focis dimicaretur, & ex reëtis adiuuaret imbellis multitudo) sustinuissent: fraus deinde rem inclinavit, inquit Liuius <sup>b</sup>, quia vocem præconis audiri passi sunt, incolumem abiturum, qui arma posuisset: eaq; spes remisit a certamine animos & passim arma iactari coepta. Eodem astu C. Fabius Ambustus, in Auxuris oppugnatione, cùm vrbe capta, magna adhuc resistentiũ (quia cedentibus nihil spei erat) pugna esset, pronunciarì repente iussit, ne quis præter armatos violaretur, reliquam omnem multitudinem voluntariam exiit armis: qua ratione facili victoria potitus est <sup>c</sup>. Simili modo cùm <sup>c Liu. lib. 4.</sup> Sutrium ex sociis populi Rom. eodem die, quo ab Hetruscis oppugnatum erat, Camillus ex improviso recepisset, & pas-

DE IVRE ET OFF. BELL.

a lib. 6.

b Appian. de  
bel. civil. i. 2.

sim trucidatis Hetruscis portas claudi iussisset, spe fugæ adempta, restitutum & accensum desperatione hostium præliū fuisse refert Liuius<sup>a</sup>, ni præcones per urbem dimissi, poni arma, & parci inermi iussissent, nec præter armatos quæquam violari. tum verò etiam, quibus animi in spe vltima obstinati ad decertandum fuerant, postquam data spes vitæ est, iactare passim arma, inermesque, quod tutius fortuna fecerat, se hosti offerre. Cæsar quoque prælio Pharsalico inclinata iam acie Pompeij, prudentissimo consilio, ne hostes rursus instaurarent ordines, quoque facilius victoria potiri posset, dimissis circumquaque præconibus, edixit suis, vt ciuibus parcerent, & in sola sæuissent auxilia: simulque victores victis occurrentes, iubebant stare securos, quo facto hæc vox, Sta securus, Pompeianis cœpit esse pro tessera: itaque Cæsar victoriam obtinuit<sup>b</sup>. huc spectare videtur, quod Lycurgus suis præcepit, vt si prælio hostes fudissent ac vicissent, tantisper modò insequerentur fugientes, dum victoriam stabilirent, deinde statim se reciperent: nō modò quia græcanicum non esset, cedentes interficere, sed & utilis hæc

hæc esset ratio. hostes enim, si scirent cedentibus parci; repugnantes occidi, fugã pugna vtiliorem sibi arbitratos.<sup>a</sup>

<sup>a</sup> Plut. in a-  
poph.

In victoria potissimum de pace cogitandum.

- 1 *Melius malam, quàm bonam fortunam ferre possumus.*
- 2 *Nec secundæ, nec aduersæ res immoderatè ferendæ.*
- 3 *In victoria paci studendum.*
- 4 *In bello nihil miseriùs victoriæ.*

## CAP. DVODECIMVM.

I Ta profectò natura comparatum est \*, vt melius malam, quàm bonam fortunam ferre possimus. etenim, vt inquit Tacitus, secundæ res acrioribus stimulis animum explorant, quàm aduersæ: quia miseriæ tolerantur, felicitate corrumpimur. quod cognoscens Abdolominus e stirpe quidem regia, sed inops admodũ, & pauper, à Sidonibus permissu Alexãdri rex constitutus, rogatus ab Alexandro, qua patientia inopiam tulisset, respondit: Vtinam eodem regnũ pati possim <sup>b</sup>. & huius quoque rei exemplo est ipse Alexander Magnus, qui priusquam se fortuna animo eius infudisset, orientè

<sup>b</sup> Q. Curtius  
lib. 4.

DE IVRE ET OFF. BELL.

eam moderatè & prudenter tulit ; ad vltimum verò magnitudinem eius nō tulit<sup>a</sup>. Fit enim plerunque , vt rebus prosperis insolescat animus humanus , vt iā nec alios ferre possit , nec se . vbi tamen maximæ cuiq; fortunæ minimè credendum sit : cūm quid vesper feret , incertum sit. Vnde vt aduersas res\* , sic secūdas im- 2 moderatè ferre maximæ leuitatis est . & rectè præcipere videntur , qui monent , vt quanto superiores simus , tanto nos submissius geramus . Sicuti enim equos , vt ait Cicero<sup>b</sup> , propter crebras contentiones præliorum ferocitate exultantes , dormitoribus tradere solent , vt his facilio-ribus possint vti : sic homines secundis rebus effrenatos , sibiq; præfidentes , tanquam in gyrū rationis , & doctrinæ duci oportet : vt percipiant rerum humanarū imbecillitatem , varietatemque fortunæ . nam non statuendo tandem felicitati modum , nec cohibendo effrentem se fortunam , quanto quis altius elatus fuerit , eo foedius corruet . Itaq; in victoria\* , 3 quæ alioqui insolens & superba est , potissimum paci studendum : neque expectandum , donec ( vt Demades de Atheniē . intempestiuo belligerandi studio deditis

<sup>a</sup> Q. Curtius  
lib. 4.

<sup>b</sup> offic. lib. 1.

deditis dicebat) atrati eadem petere cogamur<sup>a</sup>. nusquam enim minus, quàm in bello euentus respondet. Quare cum Mago nūcius victoriæ Annibalis ad Cānas, Carthaginem venisset, & senatu ei dato, res fratris in Italia amplissimis verbis extolleret, & quo propior spes belli perficiendi esset, eo magis omni spe iuandum Annibalē esse diceret: his nihil motus Hanno, quē semper belli suscepti aduersus Romanos pænituit, prudenter monuit, vt in secundis rebus fortuna vti vellent, & de pace potius, quàm de bello cogitarent: Nam, inquit, si prætermittas hoc tempus, quo magis dare quàm accipere possumus videri pacem, vereor ne hæc quoque lætitia luxuriet nobis, & vana euadat<sup>b</sup>. cuius sententia tunc temporis spreta, postea sed serò nequicquam a senatu laudata fuit: cum eò adacti essent, vt quas dare potuissent cōditiones pacis, postea sibi dari petentibus, denegatæ fuerint: & eo statu essent, quo de Latinis refert Liuius, vt neque pacem, neque bellum ferre possent, qui status rerum omnium miserrimus est. Idem euenit Antiocho, cui (iam Romanis in Asiam contra ipsum transfuectis) de pace

DE IVRE ET OFF. BELL.

componenda agentī, respondit Scipio, hoc prius faciendum fuisse; non iam, ubi frenum, fessoremq; rex accepisset<sup>a</sup>. Non est itaque sapientis, pacem certam, quæ in victoris manu sit, fallaci spe incertæ victoriæ, quæ in fortunæ manu sit, redimere. Quare Hasdrubal Hoëdus Carthaginiësiū legat<sup>o</sup>, cū de pace in senatu Romę ageret, dicebat, raro simul hominibus bonam fortunam, bonamque mentem dari, & populum Rom. eò inuictum esse, quòd in secundis rebus saperet, & consulere meminisset: si in secundis rebus bonam quoque mentem donarent dii, non solum ea quæ euenissent, sed etiam ea quæ euenire possent, reputaremus. Et Cicero<sup>b</sup> ad Marcellum scribens: Licet, inquit, omnia sint misera in bellis, miserius tamen nihil, quam ipsa victoriā<sup>c</sup>: 4 quæ etiam si ad meliores venit, tamen eos ipsos ferociores impotentioresque reddit: ut etiam si natura tales non sint, necessitate tamen tales esse cogantur. Itaque Cęsar memor huius impotentię humani animi, hoc vnum esse tempus, de pace agendi cum Pompeio inquit, dum sibi vterque cōfideret, & pares ambo viderentur: si verò alteri paululum tribuisset for-

<sup>a</sup> Plin. in a-  
popb. App. de  
bel. Syr. Liu.  
lib. 37

<sup>b</sup> epist. fam.  
lib. 4. epist. 3.

set fortuna, non esse vsurum conditionibus pacis eum, qui superior videretur, neque fore æqua parte contentum, qui se omnia habiturum confideret.<sup>a</sup>

<sup>a</sup> Cas. de bel. civil. lib. 3.

Deiſtis hoſtibus, qua potiffimum ratione perpetua pace quieti obtineri poſſint.

- 1 *Non minor virtus parta tueri, quàm acquirere.*
- 2 *Conſilium Herennij Pontij de Romanis ad Furcas Caudinas incluſis.*
- 3 *Sententia Camilli de Latinis victis.*
- 4 *Iudicium ſenatus de Priuernatibus ad deſitionem coactis.*
- 5 *M. Catoſis ſententia in rebellantes.*
- 6 *Romani non permiferunt ſociis ſine Romano duce bellum gerere.*
- 7 *Mos deducendi colonias.*

## CAPVT XIII.

**I**CVm non minor ſit virtus \*, quàm querere parta tueri: & victoria rectè vti, quàm vincere, (nã vt rectè Ouidius: *Casus in eſt illic, hic erit artis opus:*) ideoq; bella geramus, vt in pace viuamus: deiſtis hoſtibus tota cõſultatio eſſe debet, qua potiffimum ratione in perpetuũ a rebellando eos contineamus. Quid enim profuit Pyrrho, in deuincendis hoſtibus

DE IVRE ET OFF. BELL.

stibus magnū fuisse, cū acquisita tueri non potuerit: tanto melius studebat acquirere imperia, quā retinere. <sup>a Iusti. l. 25.</sup> quam obrem collatus fuit ab Antigono indocto lusori, qui cū & multa & feliciter edat, iis tamen nesciat vti. in quam rem longè vtilissimum censeo consilium Herennij Pontij\* C. Pontij patris. nam cū 2 Samnites, duce C. Pontio, Romanos fraude ad furcas Caudinas inter duos saltus pertraxissent, & inopes consilij in tam lætis rebus Herēnium Pontium consulendum censerent, consultus a nuncio filij Herennius, cēsuit omnes inde quā primū inuiolatos dimittendos. quæ vbi sprete sententia esset, & iterum iterumque eodem remeante nuncio consulere, censuit ad vnum omnes interficiendos: indicans priore cōsilio, quòd optimum duceret, cum potētissimo populo, per ingens beneficium perpetuam firmare pacem amicitiamque: altero in multas ætates, quibus amissis duobus exercitibus, haud facile receptura vires Romana res esset, bellum differre: tertium nullum consilium esse. & cū filius, alijque principes percūctando exquirerēt, quid si media via consilium caperetur, vt & dimit-

& dimitterentur incolumes, & leges ius  
 » iure belli victis imponerentur : Ista, in-  
 » quit, sentētia ea est, quæ neq; amicos pa-  
 » rat, neque inimicos tolli, seruare modo  
 » quos ignominia irritaueris. ea est Ro-  
 » mana gēs, quæ victa quiescere nescit: vi-  
 » uet semp in pectoribus illorū, quidquid  
 » isthuc præsens necessitas iniunxerit, ne-  
 » que eos ante multiplices pœnas expeti-  
 » tas a vobis quiescere sinet. At neutra sen-  
 » tentia accepta fuit : sed Romanis sub iu-  
 » gum missis, pax illa Caudina facta fuit:  
 » qua postea spreta a senatu, quòd minus  
 » ritè facta esset, deditis pacis auctoribus:  
 » & Samnitibus pro superba pace infestif-  
 » simum cernētibus renatum bellum, om-  
 » nia quæ inde venerunt, non in animis  
 » solùm, sed propè in oculis erant : &  
 » sero nequicquam laudata senis Pontij  
 » vtraque consilia : inter quæ se inedia  
 » lapsos victoriæ possessionem pace in-  
 » certa mutasse, & beneficij & maleficij  
 » occasione omiffa, pugnaturus cum iis,  
 » quos potuerant in perpetuum vel ini-  
 » micos tollere, vel amicos facere <sup>a</sup>. a *Lin. lib. 9.*  
 » prudentius verò Romani. nam cùm  
 3 Camillus \* victis & perdomitis Lati-  
 » nis, ad senatum quid de iis fieri pla-  
 » ceret,

DE IVRE ET OFF. BELL.

ceret, referret, ita locutus fuisse fertur: „  
Reliqua consultatio est, quoniam rebel- „  
lando sæpius nos sollicitant Latini, quo- „  
nam modo perpetua pace quietos ob- „  
tineamus. Dij immortales ita vos po- „  
tentes huius consilij fecerunt, vt sit La- „  
tium, deinde an non sit, in vestra manu „  
posuerint. Itaque pacem vobis, quod ad „  
Latinos attinet: parare in perpetuū, vel „  
sæuiendo vel ignoscendo potestis. Vultis „  
crudeliter consulere in deditos victos- „  
que? licet delere omne Latium, & vastas „  
inde solitudines facere, vnde sociali e- „  
gregio exercitu, per multa bella magna- „  
que sæpe vsi estis. Vultis exemplo maio- „  
rum, augere rem Romanam, victos in ci- „  
uitatem accipiendo? materia crescendi „  
per summam gloriam suppeditat. Certè „  
id firmissimum longè imperium est, quo „  
obedientes gaudent. sed maturato opus „  
est, quicquid statuere placet. Tot popu- „  
los inter spem metumq; suspensos ani- „  
mo habetis: & vestram itaque de iis curā „  
quàm primùm absolui, & illorū animos „  
dum expectatione stupēt, seu beneficio, „  
seu pœna præoccupari oportet. hæc ille, „  
cuius relationem de summa rerum sena- „  
tus laudans, sed quòd aliorum causa alia „  
esset,

esset, ita expediri posse consilium dicere, ut pro merito cuiusque statueretur, relatione habita de singulis populis. Quo facto ex decreto senatus, aliis ciuitas data, sacraque sua reddita: aliis ciuitas quam habebant seruata, crimenque rebellionis a publica fraude in paucos auctores versum: aliis muri deiecti, & alio habitari iussi<sup>a</sup>. Est quoque in hanc rem memorabile iudicium senatus de Priuernatibus\*, quibus ad deditiōem coactis, & ex senatus decreto dirutis Priuerni muris, Vitrubioque eorū ducē necato, cum sociis eius noxæ: cū Plācius cons. quid de reliqua multitudine fieri placeret, ad senatum referret: vnus ex Priuernaribus legatis, magis conditionis, in qua natus esset, quam præsentis necessitatis memor, interrogatus a quodam ex senatoribus, quam poenā meritos Priuernates censeret: eam inquit, quam merentur, qui se libertate dignos censent. cuius feroci respōso cū infestos factos videret consul eos, qui Priuernatium causam impugnabant, ut ipse benigna interrogatione mitius respōsum eliceret: Quid si poenā, inquit, remittimus vobis, qualem nos pacem vobiscū habituros speremus?

*a Liv. lib. 9*

DE IVRE ET OFF. BELL.

remus? si bonam dederitis, inquit, & fidam, & perpetuam; si malam, haud diurnam. Quibus verbis concitatis nonnullorum animis, pars tamen melior senatus ad meliora responsa trahere, & dicere, viri & liberi vocem auditam: nec credi posse, vllum populum, aut hominẽ denique, in eã cõditione, cuiuseum pœniteat, diutius quàm necesse sit, mansurum: ibi pacem esse fidam, vbi voluntarij pacati sunt: neque eo loco, vbi seruitutẽ esse velint, fidem sperandam esse. Itaque ex auctoritate patrum latum ad populũ

*a Liv. lib. 8.*

est, vt Priuernatibus ciuitas daretur<sup>a</sup>. M. verò Cato \* ita maximè rebellantes contineri in officio posse censebat, si effectum esset, ne possent rebellare. itaque arma omnibus cis Iberum Hispanis ademit, vna die muris omnium dirutis: quam rem adeo ægrè passi sunt, vt multi mortem sibimetipsis consciscerent: ferox gens nullam vitam rati sine armis esse<sup>b</sup>. In quo Cato videtur secutus exemplum Cyri, qui Lydis iterum rebellantibus arma & equos ademit, iussitq; cauponias, ludicras artes, & lenocinia exercere. Qua ratione effeminati mollietie, pristinam virtutem perdiderunt, & quos

*b Liv. lib. 34*

quos ante Cyrum inuictos bella effecerant, in luxuriam lapsos ocium atque desidia superauit<sup>a</sup>. Annibal autem Sagunto capto, signo dato, omnes puberes <sup>a</sup> *Lufr. l. 1.* interfici iussit. quod imperium crudele, ut inquit Liuius<sup>b</sup>, ceterum prope necessarium cognitum in ipso euentu est. cui enim parci potuit ex iis, qui aut inclusi cum coniugibus, ac liberis domos super seipos concremauerunt, aut armati nullum ante finem pugne, quam morientes fecerunt? Quò spectare videtur Agesilai dictum, difficile esse misereri simul & sapere<sup>c</sup>. Hoc quoque consilio Romanis, <sup>c</sup> *Plut. in A. paph.* ut omnem rebellandi occasionem sociis <sup>6</sup> adimerent, non placebat\*, socios sine Romano duce exercituque propriis viribus consilioque bella gerere<sup>d</sup>. Vnde <sup>d</sup> *Dion. Hist. l. 8.* cum Æqui Latinum agrum inuasissent, & oratores Latinorum a senatu peteret, ut aut mitterent subsidium, aut seipos tuëdorum finiù causa capere arma sineret: tutius visum est defendi inermes Latinos, quam pati retractare arma<sup>e</sup>. Mos <sup>e</sup> *Lin. l. 1.* quoque verustus erat Romanis, cum quo nec foedere, nec æquis legibus esset amicitia, non prius imperio in eum tanquam pacatum vti, quam omnia diuina huma-

DE IVRE ET OFF. BELL.

naque dedisset, obsides accepti, arma adempta, præsidia urbibus imposita forent<sup>a</sup>. Fuit præterea mos Romanis, nunc hos nunc illos Italiæ populos subiugando, parte agri multare\*, in eumque colonias ducere: aut in iam ante condita oppida novos colonos sui generis ascribere. hæ colonix tanquam præsidia, partis bello provinciis imponebantur<sup>b</sup>. Itaque prouidè Sylla, licet tyrannicè, armis oppressa republ. eos, quorum opera in eo bello usus fuerat, colonos deduxit in agros & oppida eorum, qui illi restiterant: qui opportunis locis dispositi, in ipsius potestate continerent Italiã, translatis ad eos veterum possessorum prædiis: quo beneficio eos per totam vitam habuit obnoxios, & dominationem suã mirum in modum stabiliiuit. cùm enim res suas, nisi actis Syllæ ratis, tueri nequirent, propugnatores eius dignitatis fuerunt etiam post illius obitum: neque illi, quorum arces, mœnia, pecunias, immunitates iustulerat, propter inopiam nocere poterant<sup>c</sup>. Perseo autem victo, & Macedonibus liberis esse iussis, regis amicos, purpuratosque, duces exercituũ præfectos nauium aut præsidiorum, aliosque

<sup>a</sup> Lib. lib. 8.

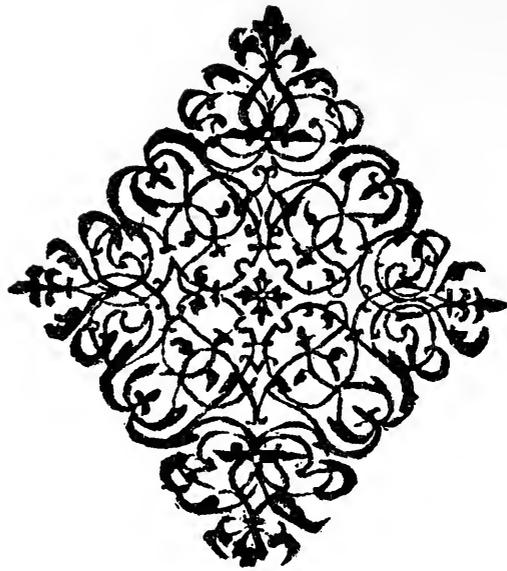
<sup>b</sup> Dion. Hal. lib. 3. 4. 5. App. de bell. ciuil. lib. 1.

<sup>c</sup> Appian. de bel. ciuil. lib. 1.

liosque ministros omnes , regi seruire humiliter, aliisque superbè imperare asuetos, Macedonia excedere Romani, & in Italiam migrare iusserunt : ne fortè quid noui in Macedonia molirentur<sup>a</sup>. a Liv. l. 45.

Huc spectasse videtur Lycurgus in legibus suis, quas Retras vocant, quibus vetuit sapius còtra eosdem bellum gerere: ne i bellandi rationem discerent. Itaque Agesilao continenter cù Thebanis bella gerente, & in pugna quadam vulnerato, Antalcidam ei dixisse ferunt: Pulchram a Thebanis mercedem reportas , quos nescientes pugnare docuisti. nam reuera narratur , nunquam bellicosiores fuisse Thebanos, quàm tum temporis, ob crebras Lacedæmoniorum aduersus eos expeditiones<sup>b</sup>. fortuna enim belli, b Plut. in A. poph.

vt inquit Q. Curtius, artem victos quoque docet.



DE IVRE ET OFFICIIS  
 BELLICIS, ET DISCIPLINA MI-  
 LITARI, LIBER TERTIVS.

DE DISCIPLINA MILITARI.

- 1 *Disciplina militaris magni est momenti.*
- 2 *Tyrones & imbelles disciplina militari sunt bellicosi.*
- 3 *Capuanâ delicia perdidit Annibalis exercitum, alioqui inuictum.*
- 4 *Neglecta vel retenta disciplina militaris testimonium.*
- 5 *Mulieres castra sequi turpe.*
- 6 *Cura recidendorum impedimentorum.*
- 7 *Muli Mariani.*
- 8 *Exercitus unde nomen habeat.*
- 9 *Leges militares.*
- 10 *Tria curare debent milites.*
- 11 *Militaris disciplina.*

CAP. PRIMVM.

I  Vantum momenti \* in disciplina militari positū sit, docēt nos historiæ, & ipsa quotidiana experientia. & certè nulla alia re populum Rom. sibi orbem terrarum subegisse, nisi armorum exercitatione, disciplina castrorum, vsuque militiæ,

DE IVRE ET OFF. BELL.

<sup>a</sup> *Vegetius de* militiæ, satis constat<sup>a</sup>, idq; pulchrè ex-  
<sup>war. milit. l. 1</sup> *pressit Quintilianus* <sup>b</sup> cum ait : Si verè  
<sup>l. 10. in proc.</sup> existimemus, imperium populi Rom. ad  
<sup>hist.</sup> hanc diem militari disciplina stetit. non  
<sup>b in milite</sup> enim nobis aut multitudo maior, quàm  
<sup>Marian.</sup> Cimbris : aut maiores opes, quàm locu-  
 pletissimis regnis: aut mortis contèptus  
 facilior, quàm plerisq; barbaris, causam  
 vite non habentibus. principes nos facit  
 seueritas institutorū, ordo militiæ, amor  
 quidam laboris, quotidianæ exercitatio-  
 nes, assidua belli meditatio. Vnde Valeri<sup>o</sup>  
<sup>c lib. 2. c. 7.</sup> Max<sup>c</sup>. præcipuum decus, & stabilimentū  
 Romani imperij, disciplinæ militaris te-  
 nacissimum vinculū fuisse dicit: in cuius  
 sinu serenus, tranquillisque beatæ pacis  
 status acquiescit. Et quidem plures exer-  
 citus seruorum<sup>\*</sup>, tyronum, & imbelliū,<sup>2</sup>  
 sola disciplina & imperio inuictos, &  
 bellicosissimos factos fuisse legimus : &  
 econtra, plurimos exercitus veteranorū  
 militum, inuictos alioqui, sola licentia,  
 omnibus vitiis, neglecta disciplina mili-  
 tati, corruptos & consumptos fuisse, &  
 longè ante periisse, quàm hostem vidis-  
 sent. cuius rei fidè facit Tullus Hostilius  
 Romanorum rex, qui Romanos qua-  
 draginta iam annos in ocio agentes, ad  
 bellum

bellum exciuit, & belli expertes, sola disciplina optimos milites reddidit<sup>a</sup>. & T. <sup>a</sup> *Liv. lib. 1.*  
 Sempronius Gracchus, cùm ei feruorum exercitus datus esset, breui effecit exercitatione & ordine militis, vt nemo eorum generis ac sanguinis sui memor in acie esset, præsidio sociis, hostibus terrori essent<sup>b</sup>. Sic quoque Pelopidas & Epaminondas, liberatis Thebis, a seruitute Spartanorum, faciliè eos institutis militaribus ex imbellibus optimos milites effecerunt: ita vt non solum pares essent Spartanis, sed etiam superiores. Scipio verò Æmilianus, optimus imperator, & qui imperatorias artes optimè callebat, vt Numantinæ vrbs magnos spiritus superiorum ducum culpa nutritos contunderet, collapsam militiæ disciplinam, vt primùm castra intrauit, eiecit duobus millibus scortorum, & omnibus iis quæ voluptatis causa comparata erant, restituisse fertur. qua ratione acrem illam & animosam Numantiam, incendiis exustam, ruinisquæ prostratam, solo æquauit. ita vt neglectæ militaris disciplinæ iudicium, vt ait Valerius Max<sup>c</sup>. Mancini miserabilis deditio, seruata mercès, Scipio-

<sup>b</sup> *Liv. lib. 21.*<sup>c</sup> *lib. 2. c. 7.*

DE IVRE ET OFF. BELL.

nis speciosissimus triumphus exstiterit. quem secutus Metellus, cùm exercitum in Africa Iugurthino bello, nimia Sp. Albini indulgentia corruptū accepisset, disciplinam militarem in statum suum redegit: & edicto primùm adiumenta ignauit̃ sustulisse dicitur: atque præclaras ex hoste victorias adeptus est <sup>a</sup>. Et Scipio Africanus posterior, consul in Africam missus, videns corruptam disciplinam militum sub Pisone assuetorum ocio, rapinis & auaritiæ, & nunquam le deuiçturum hostes, ni suos in potestate haberet: cæstigatis graui oratione militibus, omnibusque, qui non militarent, exactis, disciplina militari stabilita, potentem illam Carthaginem Rom. imperij æmulã euertit <sup>b</sup>. Annibalis verò exercitum, aduersus omnia humana mala sæpe ac diu durantem, bonis inexpertum atque insuetum, quem nulla malivicerat vis, perdidere nimia bona ac voluptates immodicæ Capuanæ\*. Somnus enim, & 3 vinum, & epulæ, & scorta, balneaque, & ocium cõsuetudine in dies blandius, ita eneruauerant corpora, animosque, inquit Liuius<sup>c</sup>, vt magis deinde præteritæ victoriæ eos, quàm præsentis tutarentur vires;

<sup>a</sup> Valerius  
M. ix. lib. 2.  
ab. 7.

<sup>b</sup> App. de bel.  
p. 118.

vires: maiusque id peccatum ducis apud peritos artium militarium habitū, quàm quod non ex Cannensi acie protinus ad urbem Romā duxisset: illa enim cunctatio distulisse victoriā videri potuit: hic error vires ademisse ad vincendum. Itaque hercle, velut si cum alio exercitu a Capua exisset, nihil usquam pristinæ disciplinæ tenuit. nam & redierunt plerique scortis impliciti: & ubi primū sub pellicibus haberi cœpti sunt, viaque & alius militaris labor excepit, tyronum modo, corporibus animisque deficiebant: & deinde per omne æstiuorum tempus, magna pars sine comœtu ab ignis dilabebantur, neque aliæ latebræ, quàm Capua desertoribus erat. Itaque M. Marcellus in aciem copiis suis eductis apud Nolas, ut suorum militum animos erigeret, hosti exprobrabat Capuam Annibali Cannas fuisse. ibi virtutē bellicam, ibi militarem disciplinam, ibi præteriti temporis famam, ibi futuri extinctam: atque ita prælio commisso hostes fudit. & quemadmodum Annibalis exercitui Capua, sic militibus Alexandri Babylonia plurimum nocuit, & disciplinam militarem admodum corrupit: usque adeo,

DE IVRE ET OFF. BELL.

a lib. 5.

vt Alexandrum ad discrimina, quæ postea sequebatur, haud dubiè debiliorem futurum fuisse, si hostem habuisset, scribat Q. Curtius<sup>a</sup>. Et vt breuiter dicam, nullum maius neglectæ, vel retentæ disciplinæ militaris testimonium \* habere 4 possumus, quàm de Romanis: qui cùm ante iusticiæ opinione, ac belli gloria omnes populos superarent: postea labente disciplina, ab omnibus superati sunt. Itaque Cato apud Sallustium: No- „ lite, inquit, existimare, maiores nostros „ armis rempubl. ex parua magnâ fecisse. „ si ita res esset, multo pulcherrimam eam „ haberemus: quippe sociorum atque ci- „ uium, præterea armorum, atque equo- „ rum maior nobis copia, quam illis est. „ sed alia fuere, quæ illos magnos fecere, „ quæ nobis nulla sunt: domi industria, „ foris iustum imperium, animus in con- „ sulendo liber, neque delicto, neque libi- „ dini obnoxius. pro his nos habemus lu- „ xuriam, atq; auaritiã: publicè egestatē; „ priuatim opulentiã: laudamus diuitias; „ sequimur inertiã: inter bonos & malos „ discrimē nullum est. omnia virtutis præ- „ mia ambitio possidet. Scitè vero Fabri- „ cius, legat<sup>o</sup> ad Pyrrhū profectus, cū apud „ eum

cum Cyneam Thessalum narrâtem au-  
 didisset, quendam Atheniensem clarum sa-  
 pientia, suadere, ne quid aliud homines,  
 quàm voluptatis causâ facerent : pro  
 monstro eam vocem accepit, continuo-  
 que Pyrrho & Samnitibus hostibus istâ  
 sapientiam deprecatus est <sup>a</sup>. Prudenter <sup>a Val. Max.  
lib. 4. cap. 2.</sup>  
 quoque Spartana ciuitas, diu ciuium suo-  
 rum oculos ab Asię aspectu retraxit, quia  
 inde omnes manare delicias, certa cor-  
 poris & animi venena perniciosissima  
 cognoscebat, & plus similibus victoriis  
 amitti, quàm bello quæri <sup>b</sup>. Hinc quoque <sup>b Val. Max.  
lib. 2. c. 6.</sup>  
 mulieres castra\* sequi apud maiores ma-  
 ximæ turpitudinis fuit, & seuerissimæ a-  
 nimaduersionis. & militi vxorem vel fa-  
 miliam apud se habere non conceditur,  
 nisi cum venia principis <sup>c</sup>. Et ne quidem <sup>c L. quiscun-  
que. C. de ro-  
mit. lib. 12.  
dl et si cõtra.  
C. d. nupt. l.  
cus. ff. de ritu  
nupt.</sup>  
 in prouincia vxorẽ ducere militi licuit <sup>d</sup>.  
 Sed & procõsul tenetur de delictis vxor-  
 ris, quam secum in prouinciam duxit <sup>e</sup>.  
 Melius quoque esse dicit Vlpianus <sup>f</sup>, vt  
 procõsul sine vxore in prouinciam pro-  
 ficiscatur. idque Seuerus Cæcina apud  
 Tacitum <sup>g</sup> censuit : inesse enim dicebat  
 mulierum comitatu, quæ pacem luxu,  
 bellum formidine morentur, & Roma-  
 num agmẽ ad similitudinem barbari in-  
 cessus

DE IVRE ET OFF. BELL.

cessus conuertant. Olim quoque ex cōstitutione Constantini, abiectarum mulierum coniunctiones, quibusdam militibus interdicebantur. quod tamen imperator Iustinianus correxit, concedens militibus, vt quascunque vellent, modò

*a Auth. vt liceat mat. vel auie. §. illo indubitanter. l. a calig. 120. C. de nupt.*

ingenuas vxores ducerent <sup>a</sup>. Præcipuè etiam ad disciplinam militarem spectat <sup>\* 6</sup> cura recidendorum impedimentorum, quibus maximè agmen grauari solet.

Vnde Philippus Macedo, cùm primùm exercitum conscriberet, vehiculorum vsum interdixit: equitibus non amplius, quàm singulos calones habere permisit, peditibus verò denis singulos, qui molas & funes ferrent. Scipio culcitra haberi prohibuit, primusque ipse culcitra foenea vsus est: milites in itinere asinos, aut mulos inequitare vetuit, dicens parū ab eo homine in bello expectandū esse,

*b Appian, de bell. Hisp.*

qui suis pedibus ire non posset <sup>b</sup>. C. Marius recidendorum impedimentorū gratia, vasa & cibaria militum in fasciculos aptata furcis imposuit, sub quibus & habile onus, & facile esset: vnde & in pro-

*c Reg. lib. 1. tit. 22. par. 2. d Tusc. ques. lib. 2.*

uerbium tractum, Muli Mariani <sup>\*. idque 7</sup> & constitutionibus fegni Hispaniæ cautum est <sup>c</sup>. Quò spectare videtur Cicero <sup>d</sup>, cūm

8 „ cùm ait : Nostri exercitus\* vnde nomen  
 „ habent vides : deinde qui labor, quantus  
 „ agminis : ferre plus dimidiati mensis ci-  
 „ baria, ferre si quid ad vsum velint, ferre  
 „ vallum. nam scutum, gladium, galeam,  
 „ in onere nostri milites non plus nume-  
 „ rant, quàm humeros, lacertos, manus.  
 „ arma enim membra militis dicunt : quæ  
 „ quidem, inquit, ita ferunt aptè, vt si vsus  
 „ foret, abiectis oneribus, expeditis armis,  
 „ vt membris pugnare possent. Alexander  
 verò cùm graue spoliis apparatuque lu-  
 xuriæ agmè vix moueretur, totius exer-  
 citus sarcinis, exceptis admodum neces-  
 sariis, conferre iussis, primū suis face sub-  
 dita, ceteras incendi præcepit, vt potius  
 sarcinarum, quàm disciplinæ iactura fie-  
 ret<sup>a</sup>. Præterea quod ad militarem disci-  
 plinam attinet, lege militari cautū fuit,  
 9 ne\* lixæ permixti cū equitibus vagètur,  
 néue frumentum publicè datum miles  
 vendat, aut prædas pecorum vel manci-  
 piorum vino commuter, néue gregarius  
 miles in acie, vel in castris seruum aut iu-  
 mentum habeat, neu quis, vbi tribunus  
 militum fuisset, postea ordinum ductor  
 esset, neque qui ordines duxisset, miles  
 postea fieret. Itaque refert Liuius<sup>b</sup>, Vo-  
 leronem

a Q. Curtius  
lib. 6.

b lib. 2.

DE IVRE ET OFF. BELL.

leronem quendam de plebe hominem, qui superioribus expeditionibus ordines duxisset, inter gregarios ascriptum, recusasse militiã : quia negaret, eo quòd ordines duxisset, se militem fieri debere, nullam ignominiam in militia meritũ<sup>a</sup>. Miles quoque qui suo tempore annonã non exegisset, ea fraudabatur<sup>b</sup>. Docendos etiam milites monebat Cato, vt feroces aduersus hostes essent; humani erga ciues ac socios: timidi ad iniurias inferendas; prompti verò ad vindictam: vtque nihil magis cuperent, quàm laudem & gloriam adipisci. Sedulo quoq; olim cauebatur, vt primum vinculum militũ putarent sacramenti religionem, secundum singulorum amorem, velut inexplicabilem nexum, tertium deserẽdi nefas. L. Æmilius Paulus dicebat, vnũ imperatorem in exercitu providere & cõsulere, quid agendum sit, debere, nũc per se, nunc cum iis quos aduocauerit in cõsiliũ : qui non sint aduocati, eis nec palam, nec secretò iactare consilia sua: militem hæc tria curare debere\*: corpus, 10 vt quàm validissimum, & perniciosissimum habeat: arma apta: cibum paratum ad subita imperia: cetera scire de se, diis immor-

<sup>a</sup> Dion. Hal. lib. 9.

<sup>b</sup> fortissimi. l. nulls. C. de or. g. milit. 47. 110, 111, 12.

immortalibus & imperatori suo curę esse debere. in quo exercitu cōsul & imperator rumoribus vulgi circūageretur, ibi nihil salutare esse <sup>a</sup>. Nam, vt inquit Tacitus, tam nescire quędam milites, quām scire oportet. Ita se ducum auctoritas, sic rigor disciplinę habet, vt multa per centuriones tribunosq; tantum iuberi expediat Parendo quoq; potius. quām imperia ducū sciscitando, res militares continētur: & fortissimus in ipso discrimine exercitus est, qui ante discrimē quietissimus. Itaque Cęsar apud Auaricū temeritatem, cupiditatemq; militum reprehēdit, quod sibi ipsi iudicassent, quò procedendū, aut quid agendū videretur: neque signo receptui dato cōstitissent, neque a tribunis militū, legatisq; retineri potuissēt: & quātō opere corū animi magnitudinē se admirari dicebat, q̄ non castrorū munitiones, nō altitudo montis, nō murus oppidi tardare potuisset: tātō opere licentiā arrogātiāmq; reprehēdere, q̄ pl<sup>9</sup> se, quā imperatorē, de victoria atq; exitu rerū sentire existimassēt: nec minus se in milite modestiā, & continentiā, quā virtutē atq; animi magnitudinē desiderare <sup>b</sup>. Ceterū exstat apud Flaujū Vopiscū

<sup>a</sup> *Lin. lib. 44*

<sup>b</sup> *Cęs. de bel. gal lib. 7.*

Aure-

DE IVRE ET OFF. BELL.

Aureliani Cæsaris epistola ad tribunum  
quendam : qua disciplina militaris \* bre- II  
uiter perstringitur, in hæc verba : Si vis „  
tribunus esse, imo si vis viuere, manus „  
militum cõtine : nemo pullum alienum „  
rapiat, ouem nemo cõtingat, vuam nul- „  
lus auferat, oleum, sal, lignum nemo exi- „  
gat, annona sua contentus sit, de præda „  
hostium, nõ de lacrymis prouincialium „  
habeat : arma tersa sint, ferramenta san- „  
nata, calciamenta fortia, vestis noua, ve- „  
terem vestem excludat, stipedium in bal- „  
teo non in popina habeat, torquem bra- „  
chiale & anulum apponat, equum sa- „  
ginarium suum defricet, animal non vè- „  
dat, mulum centuriatum comiter curet, „  
alter alteri quasi seruus obsequatur, a „  
medicis gratis curetur, at uspicibus nihil „  
dent, in hospitiiis castè se gerant, qui litè „  
fecerit, vapulet. hæc ille. Sed & quò me- „  
lius milites in officio contineantur, præ- „  
cipitur præsidibus prouinciatũ, per quas  
fit militum transitus, vt in parato habeãt  
vnde exercitus ali possit, sine querela  
prouincialium : & expensæ eo nomine  
factæ imputantur tributo, quod forte  
principi debetur : milites quoque iubẽ-  
tur iis cibariis contenti esse, quæ in sin-  
gulis

gulis inueniuntur locis, nec alia exigere possunt<sup>a</sup>: quod & cōstitutionibus Gal-  
liæ statutum est.

<sup>a</sup> *Auten. de  
trans. militi:  
coll. 10.*

De officio legati, tribuni & aliorum qui mi-  
litibus præfunt.

- 1 *Præcipua militiæ mania apud Rom.*
- 2 *Legati qui.*
- 3 *Alia legati partes, alia imperatoris.*
- 4 *Mandati fines in bello non licet excedere.*
- 5 *Vtrum ex noua rei bene gerendæ occasione a mandato recedi possit.*
- 6 *Officium regentis exercitum.*
- 7 *Commeatus parcè dandus militibus.*
- 8 *Milites pro meritis promouendi sunt.*
- 9 *Tribuni militum imperium habuerunt in milites, iisdemque vires præferri solent.*
- 10 *Tribunorum munus.*
- 11 *Falsum numerum militum referens quomodo puniatur.*

## CAPVT II.

I **Q**VÆ præcipua fuerint olim apud Romanos \* militiæ munia, satis indicat hæc Papyrij dictatoris verba a Liuiopro-  
lata<sup>b</sup>, cùm ait: Non miles centurio-  
nis, non centurio tribuni, non tribunus  
legati, non legatus consulis, nō magister  
Y equitum

<sup>b</sup> *lib. 8.*

DE IVRE ET OFF. BELL.

equitum dictatoris pareat imperio: non „  
edicta imperatorum obseruentur. De „  
officio autē imperatoris seu ducis exer-  
citus, & eius potestate alibi diximus. Le-  
gati verò erant\* comites expeditionis & 2  
adiutores negotiorum, qui consulibus,  
& imperatoribus decernebātur, vt ipso-  
rum vices gererent, & eorum cōsilio res  
administrarent. consiliorum quoque, &  
fortium factorum, ac meritæ virtutis &  
ignauix cuiusque, qua cura, qua fide, &  
diligentia, quaq; disciplina militari du-  
ces exercitui & castris præessent, si quid  
fictum vanumque, aut parum integra  
veritate afferrent, locupletissimi testes e-  
rant legati. quorū etiam auctoritas, tam  
in administranda prouincia, quàm du-  
cendo exercitu, acieque instruenda tanti  
fuit, vt absentibus, vel impeditis consuli-  
bus vel imperatore, summam imperij te-  
nerent<sup>3</sup>. Porrò illud constat, alias esse le-  
gati\* partes, atque imperatoris, vt ait Cæ- 3  
sar<sup>b</sup>, alter omnia ad præscriptum agere,  
alter liberè ad summam rerum cōsulere  
debet. Ideoque Cæsar dicebat Syllæ, quē  
decedens castris præfecerat, consilium  
non reprehendendum videri, qui suos  
longius Pompeianos persequentes re-  
uocauit:

<sup>a</sup> Alex. ab A-  
lex gen. die-  
rū lib. 6. c. 3.  
<sup>b</sup> de bell. ci-  
uil. lib. 3.

uocauit: quamuis tamen plerique existimarent, si acrius insequi voluisset, bellū eo die potuisse finiri. Sylla enim a Cæsare castris tantum relictus, liberatis suis, hoc contentus fuit, neque prælio decertare voluit. Simili ratione Q. Titurius Sabinus, legatus Cæsaris, bello Gallico castris se continuit, hostibus iam ad vallū castrorum accedentibus: quòd cum rāta multitudine hostium, præsertim eo absente, qui summam imperij teneret, nisi æquo loco, aut opportunitate aliqua data, legato dimicādum non existimaret <sup>a. a Cæsar de bel. gal. lib. 3.</sup>

Et quidē quemadmodū Romani in imperatores (quibus liberā de summa rerū consulendi potestatem concedebant) re male gesta, remissi admodum fuere, vt alio loco dictum est: sic imperij sprete vel non seruati, in legatos, tribunos, & alios imperatore inferiores, asperi vindices <sup>4</sup> exstiterūt. Mandati enim fines excedere\* in re militari vitiosissimum semper habitum fuit, & capite vindicatum, etiam re bene gesta <sup>b. l. 3. §. in bello. ff. de. e. milit.</sup> Qua potissimū ratione, & veteri instituto vicit cōtentio Papyrij dictatoris, poscētis Q. Fabium magistrū equitum ad supplicium, quòd cōtra eius imperium exercitum eduxisset, quamuis

DE IVRE ET OFF. BELL.

fufis Sānitibus in castra redierat : intercedente etiam pro Fabio populo Rom. tribunisq̄ue plebis: quibus tandem oratione Papyrij victis, & ad preces & obtestationē verfis, vt sibi pœnam magistri equitum remitteret, dictator concessit, testatus tamen, non noxæ eximi Q. Fabium, qui contra edictum imperatoris pugnasset, sed noxæ damnatum donari populo Rom. donari tribunitiæ potestati, precarium, non iustum auxilium ferenti: sibi sufficere vicisse disciplinam militarem & imperij maiestatem, quæ in

<sup>a</sup> *Liu. lib. 8.*

discrimine fuerat <sup>a</sup>. Sunt tamen qui existiment, si noua occasio rei bene gerendæ offeratur, recedi a mandato posse, si puta repentinus aliquis casus felicem successum & pæne certam victoriam polliceatur:

<sup>b</sup> *Argumento l. si hominem. ff. mandati. Latè Felinus in c. 1. col. 14. de consens. ut c. quod super. col. 3. de maio. & obed. Cremon. sing. 150 & Rochus Curt. in c. vlt. de consuet. col. 2.*

ne oblata diuinitus rei bene gerendæ occasio amittatur <sup>b</sup>. quod tamen scrupulo non caret, præsertim si alicui Papyrio, Manlio, vel Postumio, hominibus duris & inexorabilibus ratio reddenda sit: qui existimauerunt corrumpi atq̄ue dissolui officium omne imperatis, si quis ad id, quod facere iussus est, nō obsequio debito, sed consilio non considerato respondet. Etenim diligenter custodiendi sunt

sunt fines mandati, & nihil contra faciē-  
 dum est, etiam si eo facto videri possit res  
 euentura prosperius, exq; vtilitate eius,  
 qui id tibi negotium mandauit<sup>a</sup>, fuitque a l. diligēter.  
ff. mandati.  
 hæc quæstio etiam a philosophis variè  
 tractata<sup>b</sup>. Papyrij certè seueritas, alios a b Aut. Cel.  
noct. Act. li. 1  
cap. 13.  
 re bene gerenda, occasione oblata deter-  
 ruit: atque ita M. Valerio legato, qui ca-  
 stris præerat, absente Papyrio, in oculis  
 exemplū erat Q. Fabius, inquit Liuius<sup>c</sup>, c lib. 8.  
 ne quam vim hostium magis, quàm tru-  
 cem dictatoris iram timeret: itaque fru-  
 mentatores cū circumuēti ex insidiis,  
 cæsi loco iniquo essent, creditum vulgò  
 est, subueniri eis a legato potuisse, ni tri-  
 6 stia edicta exhorruisset. Porro officium<sup>\*</sup>  
 regentis exercitum, non solū in dāda,  
 vt Marciānus respondit, sed etiam in ob-  
 seruanda disciplina consistit. & qui mili-  
 7 tibus præest, quàm parcissimè<sup>\*</sup> iis com-  
 meatum dare debet: vsque adeo, vt neq;  
 piscatum, neque venatum liceat militem  
 mittere: quod in disciplina Augusti cau-  
 tum fuit<sup>d</sup>. Et quidem, vt maximè omnia  
 tuta sint, nō pluribus quàm triginta tri-  
 bunus com meatum dare potest. si pluri-  
 bus datus fuerit, eorum stipendia in fiscū  
 deferuntur: iubeturque tribunus, qui

d l. officiu.  
§ 1. & l. ne  
mo C. de re  
milit. lib. 12.

DE IVRE ET OFF. BELL.

commeatum dedit, illa militibus refun-  
 dere, ultra pœnam amissionis cinguli<sup>a</sup>.  
 Tempore verò expeditionis, vel hostis  
 imminētis, nulli omnino a signis abesse  
 licet, & capitale erit commeatum dare<sup>b</sup>.  
 Adeo autem odiosum est, a signis abesse,  
 vt miles, qui in commeatu agit, non vi-  
 deatur reipub. causa abesse<sup>c</sup>. Non potest  
 præterea is, qui exercitui præest, milites  
 a numeris ad alios numeros pro libidine  
 \*transferre, nisi vtilitatis publicæ causa &  
 princeps concefferit. Nam vt ait impe-  
 rator<sup>d</sup>, honoris augmentum, non ambi-  
 tione, sed labore ad vnumquemque cõ-  
 uenit peruenire : & non debet quis ad  
 dignitatem suffragio, sed laboribus atq;  
 ordine numerorum prouehi<sup>e</sup>. Is namq;  
 ceteros debet antecedere, quem stipen-  
 dia longiora, vel labor anteire fecerit<sup>f</sup>.  
 Iraque Q. Metellus consul; quãuis nulla  
 lege impediretur, quin filium contuber-  
 nalem perpetuum haberet, maluit tamẽ  
 eum in ordine merere. & egregio strata-  
 gemate vsus fuisse Theogenes Atheniẽ-  
 sis dicitur, qui cùm exercitum Megaram  
 duceret, petētibus militibus ordines re-  
 spondit, ibi se daturum : deinde equites  
 præmisit, eosque hostium specie impetū  
 in suos

*a l. inbemur.  
 § super his. §  
 non dāda. C.  
 de erog. mil.  
 anno lib. 12.  
 b l. 1. C. de  
 cõmeat. l. 12.*

*c l. 1. ff. de re  
 milit.*

*d in l. contra  
 publicam C.  
 de re milit.  
 no. 12.*

*e l. 1. & 2.  
 C. de of. mag.  
 off.  
 f l. 2. C. de  
 pref. prat. A-  
 fri.*

in suos retorquere iussit. quo facto, quos tum habebat tanquam ad hostium occursum præparatos, permisit ita ordinari aciem, ut quo quisque voluisset loco cōsisteret: & cū inertissimus quisque retro se dedisset, strenui autem in frontem prosiluissent, ut quemque inuenit stantem, ita ad ordines militiæ prouexit. Veteri quoque instituto ad tribunatū nemo admitti poterat, nisi prius alam duxisset: neque alam ducere nisi cohorti præfuisset. fuitque antiqui moris, ut miles in castris ad centurionem, centurio ad tribunum mane salutatum iret, & ad edictum præsto esset. Hadrianus verò Cæsar, viros ætatis exacte, & summę prudentiæ, doctos ætate & usu ad tribunatum euexit, vetuitque edicto, ne imberbis adolescens tribunus fieret. & Alexander Macedo tanti tribunos & cēturiones fecit, ut neminem, nisi sexagenarium, ordines ducere permiserit. constat tamen & olim nōnunquam in indignos, imo in impuberes has dignitates collatas fuisse a. Fuit quoque lege militari cautum, ne quis ubi tribunus fuisset, postea ordinum ductor esset. namque centurio, de-

a l. sed ceteri  
miles. §. i. m.  
autem. ff. de  
excus. tut. c.  
l. si c. de  
test. milit.

DE IVRE ET OFF. BELL.

riores erant . id tamen non in fauorem tribunorum, sed in odium P. Salonij, qui alternis fere annis & tribunus militum, & primus centurio erat ad postulationē coniuratorum militum, lege sacrata militari cautum fuisse, auctor est Liuius <sup>a</sup>. Ac licet tribunis, militum centuriones & decuriones subsint, ipsi tamen legati imperio parent. Porrò tribunos militū, qui castris & legionibus præerant \*, imperium in milites habuisse, peruulgatū est: iisque non virgas, vt consuli aut prætori, sed ad terrorem audacię, vites lictores præferebant: contumacesque milites Romani non virgis, sed vitibus per centuriones; externos verò fustibus plectebant, quę poena minus infamabat, quàm quę a licitore esset illata <sup>b</sup>. Sciendum est tamen, non licuisse tribunis in caput ciuis Romani animaduere, neque alterius quidē militis, vt alio loco dicemus <sup>c</sup>. Fuit quoque prisca moris, vt quū princeps ad tribunatum quēpiam eueheret, gladium illi in manu darēt: quo significabatur in milites iure militari habere imperium. Præcipuum verò tribunorū munus \* fuit, castrorum & exercitus curam gerere, ne sine munimento, sine custodia

<sup>a</sup> lib. 7.

<sup>b</sup> Plin. lib. 14  
cap. 1.

<sup>c</sup> §. de iudiciis  
militari-  
bus.

stodiis sint : peruigiles excubias iubere, ne quid occultè hostes moliri possint: milites in castris habere dicto audientes, & intentos imperio, ad exercitationes ducere, in stationes mittere, claues portarum suscipere, vigiliis circumire, frumentationibus cõmilitonum interesse, frumentum probare, mēlorum fraudem coërcere, querelas militum audire, eorumque delicta, secundum suæ auctoritatis modum castigare, valetudinarios inspicere, sauciorum curam gerere, in primisque milites ad solenni iusiurandum adigere<sup>a</sup>. Præterea a tribunis, siue in hostes ducere, siue castra metari, siue in prima acie, & fronte locari, aut in subsidijs poni, vel in stationes, & vigiliis ire conueniret, tesseram milites petebant: ipsi verò ab imperatore, quod dari oportebat signum, assumebant. Milites quoque in conflictu præliorum singulos & vniuersos hortari, et monere, atque in cessantes animaduertere tribuni propriū munus erat. missionem quoque militibus perfunctis militia, si causam probarent, ex auctoritate & iussu consulum dabāt: propria verò auctoritate hoc facere tribunis non licuit. Itaque Q. Fuluius

a. l. officium.  
 § officium.  
 ff. de re milit.

DE IVRE ET OFF. BELL.

Flaccus censor, Fulvium fratrem, quòd cohortem legionis, in qua tribunus erat, iniussu consulis missam fecerat, senatu mouit<sup>a</sup>. Denique ducibus, tribunis & centurionibus olim præcipuè curàdum erat, in locis ubi æstiva habebant, cogere tyrònes milites, cùm primum merere cœpissent stipendia, per turmas hinc inde crebro concurrere, decurrere, clamare, locum tenere, imperium facere, iussa exequi, seque in orbem colligere, cuneum facere, & phalangem, & sequi signa, & pati tædium, æstus ac vigilias assuescerent: ne sine consilio, sine imperio in hostes tenderent, ne pulsì loco cederent, & ut in acie quisque agnosceret ordines suos, ita ut vsu quotidiano, non minus ipsi sibi præscriberent, quid factò opus foret, nec hoc incitante vllò, nec imperante quoquam ab aliis discederèt. Quæ disciplina præcipua Iphicrati traditur, ut sine ducis opera, milites ita institueret in acie consistere, ut peritissimè dispositi viderètur. Ceterum tribunus\*, II vel centurio, vel alius, qui refert falsum numerum militum, stipendia intercipiens, condemnatur in quadruplum, & dignitate priuatur<sup>b</sup>: ex constitutionibus verò

*a Val. Max. lib. 2. cap. 7. Liv. lib. 31.*

*b l. ult. §. pro limitis in C. de off. pref. Afric.*

verò Gallia capite punitur. Item lege Julia repetundarum tenetur, qui ob militem legendum mittendumve pecuniã acceperit<sup>a</sup>: ideoque exilio, vel etiam gravius puniri solet<sup>b</sup>. & tyrocinij causa datum, repeti potest, tanquam datũ ob turpem causam<sup>c</sup>. Porro qui occasione transitus, ab urbibus vel prædiis per concussionem quid accipit, tenetur in duplũ<sup>d</sup>, qui verò provinciam nudavit, solet eo remitti, & quadruplũ restituere iuberi<sup>e</sup>.

a l. eadẽ lege.  
§. lege Julia.  
ff. ad leg. Jul.  
repet.  
b l. lex Julia.  
§. hodie. ff.  
ad leg. Jul. re-  
pet.  
c l. 3. C. de  
cond. ob turp.  
caus.  
d Auth. de  
transf. milit.  
col. 10.  
e l. 1. C. ad  
leg. Jul. repet.

#### DE METATORIBVS SIVE MENSORIBVS.

- 1 Metatores siue mensores qui.
- 2 Hospitia quomodo designentur militibus.
- 3 Qui liberi sint a molestia accipiendi hospitio.
- 4 Solum hospitium militibus concedendum.
- 5 Metatorum qui ab hospitibus pecuniam accipiunt, pœna.

#### CAPVT III.

I **M**etatores, siue mensores<sup>\*</sup>, non solum illi dicti, qui castris ponendis, tentoriis ac tabernaculis collocandis locum deligunt, ac metas præfiniunt: quae de re pulchrè Polybius<sup>f</sup>: sed etiam qui hospitio excipiendis militibus, in urbibus domos designaturi præcedunt,

f de Rom. mil.  
lit. & castro.  
mes. & Vegeti-  
tius lib. 2. c. 7

& notas

DE IVRE ET OFF. BELL.

& notas præfigūt, adiecto nomine eius, qui in quaque domo hospitio accipiendus est: quas qui delere ausus fuerit, vt falsi reus cōdemnatur<sup>a</sup>. Porrò ex rescripto imperatorū Arcadij & Honorij<sup>b</sup>, domo in tres partes diuisa, \* tertia pars militi deputata fuit: ita tamen vt dominus primam haberet eligendi facultatem, secundā hospes, tertia rursus domino relinqueretur. Tabernæ quoq; mercibus deputatæ, liberæ ab hac diuisione manere solēt: nisi fortè stabulum militi in tertia dom<sup>o</sup> parte deesset. Illustribus autē viris, nō tertia pars dom<sup>o</sup>, sed dimidia deputari solet: hac videlicet conditione, vt alter eligeret, alter æquis partibus diuideret<sup>c</sup>. Antigonus verò edixit, ne quis minor quinquaginta annis hospitio matrisfamilias vteretur: & cū filiū diuertisse audisset in domum cuiusdam, cui tres filia insignes specie essent: Audio, dicebat, fili<sup>o</sup>, angustè habitare te, pluribus dominis domū possidentibus, hospitium laxius accipe: & cōmigrare iussit. Miles præterea, qui in ea vrbe domum habet, non potest petere aliam sibi hospitij gratia designari<sup>d</sup>. Sunt autem liberi\* ab hac hospitio accipiendi molestia, medici sacri palatij, & vrbis

a l. 1. C. de  
metat. & E  
pid.  
b in l. 2. C.  
d. 2.

c d. l. 2.

d l. omnes. C.  
de metat. &  
epid. lib. 12.

& vrbis Romæ magistri liberalium artiū,  
 & pictores ingenui<sup>a</sup>. vacant quoque ab  
 hac molestia consulares, patricij, consu-  
 les, eorumque heredes, & alij qui digni-  
 tate præfulgent : quibus omnibus ma-  
 gnam immunitatem tribuit Arcadij im-  
 peratoris constitutio<sup>b</sup>. & Claudius im-  
 perator patrū decreto prohibuit milites  
 domos senatorias etiam salutandi causa  
 ingredi<sup>c</sup>. Tenues quoque vitæ homines  
 cogi non debent ad suscipiendos hospiti-  
 um milites<sup>d</sup>. Ceterū in vrbibus vbi sunt  
 4 milites \*, solum hospitium illis concedi-  
 tur: ita vt nihil ab hospite, quod vel ipsis,  
 vel animalium pastui necessarium sit, pe-  
 tere possint, nec quidem volentibus ho-  
 5 spitibus accipere<sup>e</sup>. Metatores verò \* qui  
 ab hospitibus per concussionem pecu-  
 niam acceperint, duplum eius reddere  
 cogentur, & exilio plectentur<sup>f</sup>: & consti-  
 tutionibus quidem Galliæ capite pu-  
 niuntur.

<sup>a</sup> l. Archie-  
ros. C. d. 118.

<sup>b</sup> in l. hac le-  
ge. C. d. 118.

<sup>c</sup> Suet. in vi-  
ta Claud.

<sup>d</sup> l. illicitas.  
§. tenuis. C.  
de off. pres.

<sup>e</sup> l. deuotum.  
C. de metat.  
et epid. l. 12  
l. vii. C. de  
salga. hosp.  
non prob. l. 12  
l. 3. C. de ero-  
mit. anno.  
lib. 12.  
<sup>f</sup> aut. en. de  
trans milis.  
col. 10.

DE MILITIBVS, ET QVI MILI-  
TARE POSSVNT.

- 1 Militare non est peccatum.
- 2 Milite permissum hostem occidere.
- 3 Milites qui dicantur.
- 4 Clerici in militiam non sunt recipiendi.

DE IVRE ET OFF. BELL.

- 5 *Nec coloni.*
- 6 *Nec serui.*
- 7 *Nec capitalis criminis rei.*
- 8 *Nec hæretici.*
- 9 *Nec infamia laborantes.*
- 10 *Nec membris debilitati.*
- 11 *Milites prohibentur agriculturã exercere.*
- 12 *Duas militias diuersi generis nemo habere potest.*
- 13 *Miles non potest esse procurator.*
- 14 *De ætate militari.*
- 15 *Veterani legendi.*
- 16 *Proprio milite potius quàm externo utendum.*
- 17 *Romani quamdiu suo sumptu meruerint.*
- 18 *Stipendium militum Rom. quantũ fuerit.*

CAPVT IIII.

**M**ilitare in bello \* iusto delictum nõ i  
 est, vt alibi ostẽdimus: sed propter  
 prædam militarem peccatum est<sup>a</sup>. vnde  
 vir ille Deo acceptissimus Ioãnes, roga-  
 tus a militibus de salute sollicitis, quid  
 facerẽt: non prohibuit illis militare, sed  
 dixit, Neminem concutiatis, neq; calũ-  
 niam faciatis, sed estote contenti stipen-  
 diis vestris<sup>b</sup>. Itaque tam lege canonica,  
 quàm ciuili permissum est militi \* hostẽ z  
 in bel-

<sup>a</sup> c. militare.  
23. q. 1.

<sup>b</sup> Luca 13.  
6. parat. 6.  
nam si Chri-  
stiana. 23. 5  
q 1.

in bello occidere<sup>a</sup>: imo nisi fecerit, reus  
erit imperij deserti vel contempri<sup>b</sup>. Mi-  
3 lites autem hi demum dicuntur\*, qui sa-  
cramento rogati, adactique, & in nume-  
ros relati sunt. sed & in classibus nautæ, &  
remiges sunt milites<sup>c</sup>. Porrò non quiuis  
ad militiam recipiendi sunt, neque qui-  
4 cunque cogendi. nam clerici\* in primis  
militiæ vacationem habent: quod olim  
Druidibus apud Gallos, qui rebus diui-  
nis intererant, concessum fuit, qui om-  
nium rerum immunitatem habuerunt<sup>d</sup>.  
Sacerdotes quoque, quos Romulus cõ-  
stituit, a bellicis muneribus liberi fue-  
re<sup>e</sup>. Cui tamen legi post captam a Gallis  
urbem, adscriptum fuit: ita sacerdotibus  
militiæ vacationem esse, nisi bellũ Gal-  
licum oriretur<sup>f</sup>. Cicero verò<sup>g</sup> dicit bel-  
lo Gallico vacationes valere solitas, tu-  
multu verò Gallico & Italico nõ valuis-  
se. vnde etiã infert grauius esse tumultũ,  
quàm bellum. Sed & prohibetur clerici  
militare, de quibus & de seipso dicebat  
Ambrosius: Non pila querant ferrea, nõ  
arma Christi milites, sed dolor, fletus, la-  
crymæ, & orationes fuerunt mihi arma  
aduersus hostes<sup>h</sup>. Nemo enim, vt inquit  
Apõstolus<sup>i</sup>, militans Deo implicare se  
debet

<sup>a</sup> c. miles. c. ff.  
homicid. sumi.  
23. q. 5. l. 3.  
ff. ad l. Corn.  
de sicar. l.  
proditores ff.  
de re milit.  
<sup>b</sup> d. c. miles.  
c. l. vn. §. pe-  
nult. ff. de bõ.  
poss. ex test.  
milit.

<sup>d</sup> *Cæsar de  
bel. gal. lib. 6.*

<sup>e</sup> *Dion. Hal.  
ant. Ro. lib. 2*

<sup>f</sup> *App. de bel.  
ciuil. lib. 2.  
Plut. in vita  
Marcel.*

<sup>g</sup> *Philip. 5. ep.  
8.*

<sup>h</sup> *c. non pila.  
23. q. 8. c. ff.  
quis vult. 26.  
dist. c. 1. c. ff.  
quis episco-  
pus. 6 ff.  
lis. 23 q.  
i ad Ten.*

DE IVRE ET OFF. BELL.

debet negotiis secularibus. Quod si ve-  
a c. clerici. c. statum. 23. quest. 8. rō clericus, militauerit, amittet gradū: in minoribus tamen cōstitutus, in bello iusto pugnans, nisi quem occiderit, aut vulnerauerit, non fit irregularis <sup>b</sup>. Præ-  
b c. petitio. de homicid. glos. in c. scis. citatis. 7. q. 1. terea coloni \*, nec vltro se offerentes, ad militiam admittendi sunt, neque cogēdi inuiti <sup>c</sup>. Non enim minus e repub. est, vt sint qui agros colant, quam qui bella gerant <sup>d</sup>. Hinc edictum est, vt coloni, qui se militiæ dederunt, ad priorem conditio-  
c l. 3. C. Qui milit. pol. lib. 12. l. colonos. C. de agric. et cens. lib. 11. d l. origina- rios. C. de a- grico. C. cōf. lib. 11. e l. vlt. C. de Man et colo. patr lib. 11. f l. 2. C. de prep sac. cub. lib. 12. g l. ab omni. C. de remilit. nem reuocentur <sup>e</sup>. etenim agrorum sor- des cū decore militiæ non cōueniunt <sup>f</sup>. Qua ratione quoque seruos \* ab omni <sup>6</sup> militia arceri Marcianus voluit: alio- quin capite puniri <sup>g</sup>. Refert tamen, ex rescripto Traiani, voluntarij se obtule- rint, an lecti sint, vel etiam vicarij dati. lecti enim si sint, inquisitor peccauit: si vi- carij dati, penes eos culpa est, qui dede- rūt: si ipsi cū haberēt conditionis suæ cō- scientiā, venerunt, aduertendū in illos e- rit <sup>h</sup>. Et quidem si sciente domino, serui obtinuerint militiam, priuabitur domi- nus & dominij & patronatus iure <sup>i</sup>. Por- rō primū M. Iunius dictator, & T. Sē- pronius magister equitum, post Can- nēsem cladem, delectu edicto, necessitate cogen-

cogente, octo millia iuuenū validorum exseruitiis, sciscitantes singulos, vellent ne militare, vnde volones dicti, publicè empta armauerunt<sup>a</sup>: eosdemque postea <sup>a</sup> *Lin. lib. 22* disciplina & imperio optimos milites effecere. & idem T. Sempronius consul factus, legatis tribunisque præcepit, ne qua exprobratio cuiquam veteris fortunæ, discordiam inter ordines seieret. vt vetus miles tyroni, liber voloni sese exequari sineret: omnes satis honestos generososque ducerent, quibus arma sua signaque; populus Rom. commisisset: quæ fortuna coëgisset ita fieri, eadem cogere tueri factum<sup>b</sup>. Neque solùm serui, sed <sup>b</sup> *Lin. lib. 23* qui status controuersiam patiuntur, prohibentur per id tempus, nomen militiae dare: licet reuera sint liberi. Item nec ingenui qui bona fide seruiunt, nec qui ab hostibus redempti sunt, priusquam selluant, inter milites recipiendi sunt<sup>c</sup>. <sup>c</sup> *l. qui stati-  
tu. ff. de re  
mi it.* Legimus quoque olim populum Rom. dedisse operam, ne imperatoribus capite census sacramento rogare necesse esset, quorū nimia inopia suspecta erat: ideoque; his publica arma non committebantur: & primus C. Marius hanc diutina vlturpatione firmatam cōsuetudinem, capite

DE IVRE ET OFF. BELL.

a *Va. Max. lib. 2. cap. 3.* censum legendo militem abruptit<sup>a</sup>. Præ-  
 terea rei capitalis \* criminis, voluntarij 7  
 b *l. qui cum. §. reus ff. de re milit.* milites capite puniuntur b. Similiter &  
 ij qui ad bestias dati, vel in insulam de-  
 portati militiæ se dederint, lectiue diffi-  
 mulauerint<sup>c</sup>. Ad tēpus verò relegatus,  
 si expleto spacio fugæ, militiæ se dedit,  
 causam damnationis quærendā respon-  
 dit Arrius Menander: vt si contineat in-  
 famiam perpetuam, sacramēto soluatur:  
 alioquin in ordinem redire, & honores  
 d *d. l. qui cū. §. ad tempus.* militiæ petere non prohibeatur<sup>d</sup>. Sed &  
 is qui cum adulterio vxoris suæ pactus  
 erit, sacramento solui deportarique iu-  
 betur<sup>e</sup>. nihilominus tamen M. Iunius  
 e *l. miles. ff. ad leg. Jul. de adul.* dictator, post Cannensem cladem, cū  
 populus bellis attritus, milite indige-  
 ret, edixit, vt qui capitalem fraudē ausi,  
 quiq; pecunia iudicati in vinculis essent,  
 qui eorum apud se milites fierent, eos  
 f *l. lio. lib. 23.* noxa pecuniaq; exolui iussurum<sup>f</sup>. Pro-  
 hibentur præterea militare hæretici \* g 8  
 g *l. quicumq. C. de heret. §. Ma.*  
 h *l. 2. §. mi- les. ff. de his qui not. in fa. i l. qui cum. §. ignominia ff. de re milit. l. 2. C. Qui mil. poss. li. 12*  
 & omnes infamia laborantes \* h. Vnde 9  
 ignominia missi in milites recipiendi nō  
 sunt<sup>l</sup>. Item in fraudem ciuiliū mune-  
 rum, nemo armatæ militiæ nomen assu-  
 mere potest<sup>k</sup>. & qui litis causa militiam  
 appetierit, postulante aduersario solui  
 sacra-

sacramento debet<sup>a</sup>. Sic & qui metu criminis, in quo reus fuerat postulatus, nomen militiæ dederit, statim sacramento soluendus est<sup>b</sup>. Vagus quoque & veteranus non debet in tyrocinium assumi<sup>c</sup>, indignus etiam militia iudicandus est, qui parçtes, a quibus educatus est, maleficos appellauerit<sup>d</sup>. Porrò mēbris debilitati<sup>e</sup>, ita vt inhabiles militiæ sint, in milites recipiendi non sunt<sup>e</sup>. Quo numero nō est habendus, qui cum vno testiculo natus est, quīue amisit. nam iure militabit, secundum Traiani rescriptum. Sylla enim, & Cotta duces memorantur eo habitu fuisse naturæ<sup>f</sup>. Legimus quoque Narsetem eunuchū a Iustiniano exercitui præpositum fuisse, qui bello Ostrogotorum in Italia finem imposuit. Neque enim morbosus vel vitiosus est, qui vnum tantum testem habet, cūm generare possit<sup>g</sup>. Cyrus autē custodes corporis eunuchos habuit, quo magis in officio essent, eos præter illecebras voluptatum firmissimum præsidium ratus<sup>h</sup>. Ceterum ne omissio armorum vsu, ad aliud opus se cōferant milites, prohibentur<sup>i</sup> agriculturā vel mercaturam exercere, aut quæcunq; negotia gerere<sup>i</sup>. Nam vt Plato in sua re-

a l. i. c. Quib

mil. pos. li. 12

l. qui cum. §.

nō omni. ff.

de re milit.

b l. vlt. ff. de

re milit.

c l. i. C. de

tyro. lib. 12.

d l. i. in fi. ff.

de obse. lib.

e l. qui cum.

§. qui filium.

ff. de re milit.

f l. qui cum

vno in pr. ff.

de re milit.

g l. Pompo-

nius. §. vlt.

ff. de Aedit.

edit.

h Xenō in

ped. Cyril. 7.

i l. vno. C. de

erog. mil. an-

no lib. 12. l.

officium §. i

ff. de re mi it.

l. nemo miles.

C. de re mi it.

lib. 12. l. mi-

lites. l. vlt. C.

locat.

DE IVRE ET OFF. BELL.

publ. constituit, singulos singulas artes exercere conuenit. vnde etiam miles agrum in prouincia comparare non potest, ne studio agriculturæ militiã negligat<sup>a</sup>. hinc quoque duas\* militias diuersi

*a l. milites. ff. de re mi 11.*

generis, aut dignitatem & militiam eodem tempore quis habere non potest<sup>b</sup>.

*b l. 5. C. qui mili. pos. l. 12*

& ex eadem causa miles procurator\* esse non potest, ne quidem pro patre, vel

*c l. militem. l. qui stipēdia C. de procur.*

matre, vel vxore, sed tantum in rem suã<sup>c</sup>.

Et quidem ratione possessionum, quas sibi donatas asserit, si iudicij mutãdi causa donatio facta fuerit, agere miles non

*d l. per. ff. de alie. iud. mut. causa.*

potest<sup>d</sup>: sed prior dominus debet experiri, ne magis litem, quàm rem in militem transtulisse videatur<sup>e</sup>. Prohiben-

*e l. vlt. C. ne lic. pos.*

tur denique milites accusare<sup>f</sup>, nisi in cri-

*f l. qui accu. sare. ff. de accus.*

mine læsæ maiestatis<sup>g</sup>, vel suam vel suorum iniuriam prosequantur<sup>h</sup>. Qui verò

*g l. famosi. ff. ad leg. iul. maiest.*

milites priuatis negotiis implicarint, & reipub. subtraxerint, eos Iustinianus pu-

*h l. non pro. hibentur. C.*

blicatione bonorum plecti voluit<sup>i</sup>. Re-

*Qui accus. nõ poss.*

liquum est, vt de ætate\* militari aliquid

*i Nouel. 116. de militib.*

dicamus: & quidē Romanos haud fere

quenquam minorem septem & decem annis, aut sex & quadraginta maiorem, tyrociniõ ascribi voluisse constat. id quæ

a Seruio Tullio vetere censione caurum fuisse

fuisse prius: quod æuo subsequente a C. Graccho lege sacrata sancitū fuit <sup>a</sup>. La- <sup>a</sup> *Plat. in vi-*  
 borantibus tamen Romanis contra Ve- <sup>ta</sup> *Gracchi*  
 ios, delectu habito, non modò iuniores  
 conscriptos refert Liuius <sup>b</sup>, sed etiam se- <sup>b</sup> *lib. 5. & 6.*  
 niores coactos nomina dare, vt vrbis in-  
 terea custodiam facerēt, quod & Camil-  
 lus iussit. Rursumque post Cannensem  
 cladem Decius Iunius dictator, iunio-  
 res decem & septem annis, imo & præ-  
 textatos militiæ ascripsit, notatiq; sunt,  
 qui maiores annis sexdecim illo bello nō  
 militassent <sup>c</sup>. Phociō verò, vt Athenien- <sup>c</sup> *Lib. lib. 32.*  
 ses nimis bellicosos, a belli furore, dele-  
 ctu acerbo cohiberet, lecta iuuentute, e-  
 tiā octogenarios emeritis stipēdiis coë-  
 git nomina dare. Exstat tamen constitu-  
 tio Frederici imperatoris <sup>d</sup>, quæ dicit de <sup>d</sup> *in §. con-*  
 duello agens, maiorem sexaginta annis, <sup>stitution m.</sup>  
 & minorem viginti quinque non teneri <sup>de qual. &</sup>  
 per seipsum pugnare. Historia verò sa- <sup>etat. pug. in</sup>  
 crae dicit, Dominum præcepisse Moyse, <sup>f. in v. lib. feu.</sup>  
 vt omnes Israëlitas vigesimum ætatis an-  
 num excedentes, militiæ ascriberet. quā  
 ætatem etiam idoneam militiæ censuit  
 Plato. Vt vt sit, bene præcipitur, vt tyro-  
 nem quærat, qui veteranum non habet.

15 Longè enim pluris faciēda est exercita-

DE IVRE ET OFF. BELL.

torum veteranorū parua manus, quā indocta & belli expers multitudo, quæ cædi exposita minima quæque formidat, & fugam magis quā gloriam meditat<sup>r</sup>. Itaque Alexander, mortuo patre Philippo, cum quadraginta millibus veteranorum, quos illi pater optimè eruditos, & rei bellicæ peritos reliquerat, varias innumerabilesque hostium copias superavit, & plurimas orbis terrarū provincias subegit, & idem ducturus contra Dariū veteranos peritos belli, magna cura militiæ asscripsit, & parua manu ingentem Persarum numerum fudit, fugavitque. Solēt quoque veteres ex corporis habitudine, si apti militiæ, si lato pectore, si ceruice erecta, si fortes, si strenui, quæ species, qualisque vigor, & quod robur virium foret, internoscere, vt illorum forti fidelique opera respubl. vti possent. Vnde Cato pingue militem, velut reipubl. inutilem censuit, cuius inter guttur & inguen cuncta sub ventris dominio forent. Admonendi quoque sunt principes, vt potius proprio milite\*, quā externo, qui non tam proglo- 16  
ria, quā stipendio militant, in bello v-  
tantur: exemplo Tulli Hostilij: qui cum  
Romani

Romani quadraginta annis in pace & otio vixissent belli expertes, & bellum gerere instituisset, aspernatus externa auxilia, suos tātum ad arma exciuit, & breui tēpore disciplina optimos milites effecit. Longè enim tutissima sunt domestica præsidia, & longè aptiora sunt propria arma, quàm aliena. quod nobis quoque ostēdisse videtur historia sacra. nam David cū se offerret ad singulare certamen cum Goliath Philistæo: & Saul, vt illi animum adderet, suis armis illū armasset: David noluit iis vti, quòd iis impediretur, sed propriis tātum, funda scilicet, & baculo congressus hostem prostravit<sup>a</sup>. Et quidē si omnino externis a Reg. I. c. 13 auxiliis dux belli vti velit, aut necessitas cogat: illud cauendum præcipuè, ne ita illis credat, vt non plus sui roboris, suarumque virium in castris habeat: ne meritò ei eueniat, quod Cn. Scipioni in Hispania cum Asdrubale bellum gerenti, nam Asdrubal, animaduertens exiguum Romanorum exercitum in castris Cn. Scipionis, & spem omnem in Celtiberorū auxiliis esse, per occulta colloquia cum Celtiberorum principibus conuenit, magna mercede, vt copias inde ab-

DE IVRE ET OFF. BELL.

ducerent, néue bellum gererét: nec metus a Romanis erat, quippe tam paucis, ne se retinerent. Quod exemplum pro documento habendū Romanis ducibus suadet Liuius<sup>a</sup>. Constantinopolitanus autem imperator, cū propriis armis careret, accercitis auxiliis Turcarum, ut se a vicinis tueretur, eosdem finito bello expellere nō potuit. vnde vniuersa Græcia Turcarum dominio subacta est. Non itaque Cyri consilium probo, qui non ex ciuibus legendos milites, sed velut optimos equose longinquo quæri oportere dicebat: neque Alexadrinorum vetustum morem, qui nullos milites nisi peregrinos admittebant. Rectius Romani qui quò milite proprio abundarét, in foedere quod cum Antiocho percusserunt, cauerūt ne milites sub ditione populi Rom. conducere, aut volūtarios habere liceret<sup>b</sup>: & cū bello cum Pyrrho contenderent, quamuis bis prælio victi, auxilia tamen a Carthaginensibus missa remiserunt<sup>c</sup>. Ceterum notatum dignum est, milites Romani nominis<sup>d</sup>, a 17. condita vrbe, per annos fere trecentos quinquaginta, suo sumptu & impensa meruisse. partem enim anni sub pèllibus milita-

<sup>a</sup> lib. 25.

<sup>b</sup> Liu. lib. 38  
App. in bello  
Syri.

<sup>c</sup> Iust. lib. 18.

militabant; partem verò liberis, vxori, & penatibus, sibi que ac familiæ, agrum colendo & rei rusticæ nauâdo operam parabât. Quo autem tempore de bello indicendo Veijs agebatur, vbi diutina & difficili obsidione opus erat, & hyemando continuare bellum, Romani vtili & necessario exêplo docti, senatus decreto militibus stipendium de publico collata stipe statuere: cùm ante id tēpus de suo quisquē functus eo munere esset<sup>a</sup>. Por- <sup>a Liv. lib. 4.</sup>

rò post Cannensem cladem illatam, tâta inclinatio animorum fuit, ad sustinendâ inopiam ærarij, vt non eques, non centurio, stipendium acciperent: mercenariumque increpantes vocarent, qui ac-

18 cepisset<sup>b</sup>. Stipendium verò \* militum <sup>b Liv. lib. 24</sup> Rom. fuisse decem asses diurnos indicat Tacitus<sup>c</sup>, cū ait: Milites in illa seditione

Pannonica inter alia cōquestos, denis in <sup>c 477. ab excess. Aug. lib. 1.</sup> diem assibus animam & corpus æstimari: hinc vestem, arma, tentoria, hinc sæuitiam centurionum, & vacationes munerum redimi: itaq; petiisse vt singulos denarios mererent. Ex quibus apparet quod quamuis denarius primum æstimatus fuerit decem assibus, quapropter & decusse x. signabatur: tamen postea

DE IVRE ET OFF. BELL.

temporibus auctam fuisse denarij æstimationem. Itaque Q. Fabio Max. dictatore, cum Annibal premeret rempubl. denarium xvj. assibus permutatū fuisse scribit Plinius: qui tamen in militari stipendio denarium pro decem assibus semper datum fuisse asserit<sup>a</sup>. prætorianæ verò cohortes binos denarios accipiebāt<sup>b</sup>. Hunc verò denarium si cum nostri temporis moneta conferamus in pondere & valore, fere æqualem fuisse regali Hispanico post Endæum & alios aperte ostendit Couarruuias<sup>c</sup>: ita ut stipendium nostrorum militum, nihil aut parum a Romano stipendio differat<sup>d</sup>. Stipendium verò equitum Rom. quantum fuerit, nō satis constat, quàm quòd assignabantur illis equi publici, & in prædæ diuisione nonnunquam triplum, nonnunquã duplum eius quod pedites ferrent. Itaque ex præda, quam L. Æmilius Paulus fecerat, Perseo victo, pediti, inquit Liuius<sup>e</sup>, in singulos centeni dati, duplex centurioni, triplex equiti, ex quo nonnulli de stipendio equitis coniecturam faciunt. sed alio loco idem Liuius<sup>f</sup>, ex præda Epiri cluitatum, quæ ad Persea defecerant, tantum fuisse, ut in equites cccc. denarij, pediti-

a lib. 33. c. 3

b Tacitus  
Anna. lib. 1.  
c de vero. col.  
num. cap. 2.  
Hadr. in no-  
men. cl. rei  
num.

d Alc. in  
Tuc.

e lib. 55.

f lib. 55.

peditibus duceni diuiderentur. Itaque nihil certi hac de re affirmare aufim. illud certè cōstat, equites in maximo honore apud Romanos fuisse.

## DE SACRAMENTO MILITARI.

- 1 *Militia sacramento non ascriptus militare non poterat.*
- 2 *Sacramentum quomodo præstari solitum.*
- 3 *Varia formula iurandi.*
- 4 *Quale iuramentum apud Lacedæmonios præstari solitum.*
- 5 *Quoritu Samnites iurarent.*
- 6 *Ius iurandum puberum Atheniensium.*

## CAPVT V.

**I**NEMINI apud Romanos \* militare permissum fuit, nec quidem hostē gladio petere, qui sacramento militari non esset ascriptus: perindeque in eum militaris animaduersio fuit, qui hostem militiæ sacramento non ascriptus occideret, quàm qui ciuē aut socium iniuria affecisset. itaque cùm Pompilius, vel ut alij legunt, Paulus Æmilius, vnam legionem, & Catonis quoque filium, qui in eadem legione militabat, dimisisset, & Catonis filius ardore pugnandi in exercitu

DE IVRE ET OFF. BELL.

citu mansisset: Cato ad Pompilium scripsit, uti, si eum pateretur in exercitu manere, secundo eum obligaret militiæ sacramento: quia priore amisso, iure cum hoste pugnare non posset. Idem quoque scribebat ad filium, ut caueret, ne prælium iniret, negans ius esse, qui miles non sit, pugnare cum hoste<sup>a</sup>. Sed prius<sup>a</sup> sua spō-<sup>2</sup> te decuriati equites, centuriati pedites, sacramenta mutuò præstabant. Paulo deinde Emilio & Terentio Varrone consulibus, primùm, quod nunquam ante factum erat, milites a tribunis militum, a voluntario sacramento ad legitimũ iurandum adacti fuere. Quod quidem imperator præstare tenebatur primus, suo mox ordine subsequebantur legati, deinde tribuni, deinde centuriones, postea decuriones, mox præfecti castrorũ, demum milites: quod singulis annis, calendis Ianuariis denuo præstabatur. Iurabant autem per deos<sup>a</sup> solenne iuramentum; se iussu consulam conuenturos, neque iniussu abituros: sese fugæ neque formidinis ergo non abituros, neque ex ordine recessuros, nisi teli sumendi, aut petendi, aut hostis feriendi, aut ciuis seruã-<sup>3</sup> di causa<sup>b</sup>. Posterioribus verò temporibus,<sup>3</sup> ut re-

<sup>a</sup> Cic. offic.  
lib. 1.

<sup>b</sup> Liv. lib. 22

vt refert Vegetius<sup>a</sup>, iurabant milites per Deum, & Christum, & Spiritum sanctū, & per maiestatem imperatoris (cui, inquit, tanquam corporali deo fides & deuotio præstanda est) se omnia strenuè facturos, quæ imperator iuberet, militiam nunquam deserturos, neque mortem recusaturos pro Rom. rep. Nonnunquam verò cum ingens subeūda dimicatio esset, & in extremū discrimen res venisset: milites nisi victis, debellatis, fuisq; hostibus victores forent, se in castra nunquam redituros, iurare solitos fuisse legimus. Quod M. Fabio & Cn. Manlio consl. bello cōtra Veientes & Hetruscos factum fuit. nam cum consules castris se tenerent, neque militi arma crederent: (quòd priore anno odio Cæsonis Fabij consulis, fufos hostes ab equitatu pedes insequi noluisset, iniussuq; consulis signa in castra retulissent) primus M. Flauolenus, ardore pugnae: Victor, inquit, M. Fabi reuertar ex acie: si fallat, Iouem patrem, gradiumq; Martem, aliosq; iuratos inuocat deos: & idem deinceps omnis exercitus in se quisque iurabat<sup>b</sup>.

<sup>a</sup> de re milic. lib. 2. cap. 3.  
<sup>b</sup> Liv. lib. 2.

Similiter cum prope Dyrrachium Pōpeius constitisset, castraq; metari iussisset,

DE IVRE ET OFF. BELL.

fisset, perterrito exercitu, Labienus ut exercitum cōfirmaret, princeps iurabat se Pompeium non deserturum, eūdemque casum subiturum, quemcunque ei fortuna tribuisset: hoc idem reliqui iurabant legati, hoc tribuni militum, centurionesque sequebantur, atque idem omnis exercitus iurabat<sup>a</sup>. Et idem Labienus, cū Pompeius prælio decertare cum Cæsare cōstituisset, primus iuravit, se nisi victorem in castra nō reuersurum, reliquosque ut idem facerent, hortatus est. hoc laudās Pompeius, idem iuravit, nec ex reliquis fuit quisquam, qui iurare dubitaret<sup>b</sup>. Petreius quoque legatus Pompeij, suis de transiitione ad Cæsarem per colloquia agētibus, ab omnibus iusiurandum exegit, se exercitum, ducesque non deserturos, neque prodituros, neque sibi separatim a reliquis cōsiliū capturos: & princeps in hæc verba iurabat ipse, & ad idem iusiurandum adegit Afranium: subsequabantur tribuni militum, centurionesque: centuriatim producti milites idem iurabant<sup>c</sup>. Alexandri verò milites in verba ipsius ipso præeunte iurabant, eosdem se inimicos amicosque abituros, quos ipse habuisset<sup>d</sup>. Hoc etiam

<sup>a</sup> *Cas. de bel. simil. lib. 3.*

<sup>b</sup> *Cas. de bel. simil. lib. 3.*

<sup>c</sup> *Cas. de bel. simil. lib. 1.*

<sup>d</sup> *Q. Curtius lib. 7.*

4 etiam iuramentū apud Lacedæmonios \*  
 præstare soliti sunt milites, eosdē scilicet  
 cum imperatore amicos inimicosq; ha-  
 bituros: vtque bonorum, malorumque  
 firma cōsensio inter eos & fœderatio ef-  
 5 set. At Samnites\* in magno discrimine,  
 ritu quodam sacramenti vetusto, velut  
 initiatis militibus, delectum habebant;  
 & sacrificio solenni more perfecto, per  
 viatorem imperator acciri iubebat no-  
 bilissimum quemque genere, factisq;,  
 & circumstantibus cēturionibus, strictis  
 gladiis, admouebatur altaribus miles,  
 magis vt victima, quàm vt sacri parti-  
 ceps: adigebaturque iureiurando, quæ  
 visa auditaque in eo loco essent, non e-  
 nunciaturum: deinde iurare cogebatur,  
 diro quodam carmine in execrationem  
 capitis, familiæ & stirpis composito, nisi  
 issset in prælium quò imperatores duxif-  
 sent: & si aut ipse ex acie fugisset, aut si  
 quem fugientem vidisset, non extemplo  
 occidisset. idque abnuentes iuratos se  
 obtruncabantur circa altaria: iacentes  
 deinde inter stragem victimarum, docu-  
 mento ceteris fuere ne abnuerent <sup>a</sup>. Ius-  
 6 iurandum autem \* puberum Athenien-  
 sium, ex Æschino tale fuisse constat: Arma  
 sancta

<sup>a</sup> Liv. lib. 10

## DE IVRE ET OFF. BELL.

sancta neutiquam cum dedecore tractabo, commilitonem, quicumque mihi in acie adiunctus fuerit, in periculo nō deseram. pro aris & focis, tam solus quam cum multis strenuè pugnabo. patriam, qualem & quātam inuenero, neque minorem, neque deteriolem, sed & maiore & meliorem relinquam. Memoriae quoque proditum est, Atheniēses, cū propter quotidianas contentiones, & violatum ius gentium, infensi Megarensibus, & animo hostili essent: quoties milites solito militari sacramēto adigebant, hoc etiam iusiurandum illos subire coēgisse, se intra militiæ tempus, quotannis quoquo modo possent, Megarensium agros, finesque infesto exercitu inuasuros, & peruastatis agris, nihil intactum relicturos, atque in eos omni clade belli grassaturos. Ceterum illud notandū est, quod si ab vniuerso exercitu Romano iusiurandum consuli præstādum esset, satis fuisse si centurio, vel tribunus, exercitus nomine, conceptis verbis sublimi voce iuraret: omnisque multitudo, & singuli milites communi conspiratione, & consensu in eadem verba silentio in se quisque iuraret: hocque iusiurandum, ac si concepta

cepta verba singuli expressissent, perinde tenebat, atque sanctum & illibatum habebatur. Non omittendum quoque solere tribunos conuenientes, vbi castra metati essent, ab omnibus, qui in castris essent, liberis pariter & seruis, singulatum iusiurandum exigere, se nihil e castris furto ablaturos: imo si quis etiam inuenisset quippiam, id allaturum ad tribunos<sup>a</sup>.

<sup>a</sup> Polyb. de Rom. castr.

## DE MISSIONE.

- 1 *Militia semel ascriptus deleri nequibat.*
- 2 *Miles a signis abesse non potest.*
- 3 *Tria missionum genera.*
- 4 *Honestamissio.*
- 5 *Causariamissio.*
- 6 *Ignominiosamissio.*
- 7 *Ignominia differt ab infamia.*
- 8 *Qui ignominiamitti possint.*
- 9 *Quartummissionis genus.*
- 10 *Solus imperator missionem dare potest.*

## CAPVT VI.

1 **M**ilitiæ semel ascriptus\*, nisi propter demerita exauكتورatus foret, ipso nolente deleri nequibat. fuit enim lata lex sacrata militaris, M. Valerio Coruino dictatore, ne cuiusquam militis

a scripti

DE IVRE ET OFF. BELL.

scripti nomen, nisi ipso volente, deleretur<sup>a</sup>. Sed nec miles\*, donec sacramento solutus esset, a signis abesse, vel militiam deserere poterat<sup>b</sup>. Fuere autem tria\* mil-<sup>3</sup> sionum genera, quibus miles exauctorbatur, & sacramēto soluebatur: honesta, causaria, & ignominiosa<sup>c</sup>. honesta\*, quæ<sup>4</sup> emeritis stipendiis, & functis commodis missionum, vacationis munere donabatur. quo tempore scuta, gladios, & armadicare solent Laribus, sicut gladiatores Herculi: quòd diis iuuantibus perfuncti militia, rudem accepissent, quod missionis tempus militi quinquagenario fuit definitum. Augustus tamen his, qui maiores quinque & quadraginta annis equum retinere nollent, reddendi equi gratiam fecit, illosque velut emeritis stipendiis dimisit. Alij nisi decennio stipēdia meruisset, missionem petere neminē putarunt posse. More tamen Romano militare sacramentum in vndecimū diffundebatur annum, quo exacto, militia perfunctis missio dabatur. Deinde vt decimus sextus annus stipendij finem faceret, Tyberio imperante cautum fuit, qui etiam militiæ tempus ad vigesimum annum produxit: cavitque vt nisi post vigesimum

a *Liu. lib. 7.*

b *l. pan. ff. ex quib. caus. ma. l. nō omnes. ff. de re milit.*

c *l. milites agrum §. missionum. ff. de re milit. l. 2. ff. de his qui nos. infra.*

gesimum annum missio militi daretur,  
 quod iuri nostro conuenit<sup>a</sup>. & ita missus  
 habet a ciuilibus muneribus vacationē,  
 & plurimis priuilegiis gaudet<sup>b</sup>. *Causaria*  
 5 verò<sup>\*</sup> missio dicitur, cū senecta, aut va-  
 letudine aduersa, vitiōue corporis, mi-  
 nus idoneus militiæ quis renunciatur.  
 Quæ non facilè concedi solet, nisi renū-  
 ciantibus medicis, & iudice diligenter  
 examinante vitium: & semel concessa,  
 nō solet missus iterum admitti prætextu  
 recuperatæ valetudinis<sup>c</sup>. sed & ex qua-  
 cunque causa missus, denuò in militiam,  
 sine mandato principis, admitti non po-  
 test<sup>d</sup>. & quidem ex his causis missus, ha-  
 bebbit quoque vacationem a muneribus,  
 quamuis non perpetuam<sup>e</sup>. nec enim iis  
 priuilegiis fruitur, quibus ij, qui imple-  
 tis stipendiis missi sunt: aliis tamen ve-  
 teranorum priuilegiis gaudebit, & præ-  
 mia veteranis concessa percipiet<sup>f</sup>. *Cau-*  
*saria* enim missio, nullam existimationis  
 maculam aspergit<sup>g</sup>: & honesta quoque  
 missio dicitur<sup>h</sup>. Ita verò missos vocat *Li-*  
*uius* i *causarios*, cū ait: Tertius exerci-  
 tus ex *causariis* senioribusq; a *T. Quin-*  
 6 *tio* scribatur, qui vrbi mœnibusque præ-  
 sidio sit. Ignominiosa verò<sup>\*</sup> missio, quæ

*a l. sed et mil.*  
*lites. §. quan-*  
*doque. ff. de*  
*excus. iur. l.*  
*ult. C. de his*  
*qui non impl.*  
*stip. sac. mis.*  
*sunt, lib 10.*  
*b d. § quan-*  
*doque. et l.*  
*pen. C. d. ut.*  
*de his qui nō*  
*implet.*

*c l. semel. C.*  
*de renul. l. 12*

*d l. 2. C. de*  
*diuer. off. l. 12*

*e d. l. sed et si*  
*miles. §. quā-*  
*doq; cum seq.*  
*ff. de excus.*  
*lur.*

*f l. milites a-*  
*gram. § illud*  
*ff. de re milit.*  
*g l. causaria.*  
*C. de re milite.*  
*lib. 12.*

*h ut d. l. sed*  
*et si miles. §.*  
*qui auic. ff.*  
*de excus. iur.*  
*i lib. 7.*

DE IVRE ET OFF. BELL.

& probrosa dicitur, est cum miles obde-

lictum, vel crimen sacramento soluitur,

& ita missus ex edicto prætoris fit infamis<sup>a</sup>: & dignitatē consequi non potest<sup>b</sup>:

nec in vrbe cōsistere potest, nec alibi vbi princeps est<sup>c</sup>. Et quidem sine ignominia

mentionemissus, nihilominus ignominiamissus intelligitur, vt Marcianus voluit<sup>d</sup>. Vlpianus tamē causam ignominia

addendam missioni censet<sup>e</sup>. Ad tempus verò missis, tempore impleto non por-

rigitur infamia<sup>f</sup>. Sciendum autem est<sup>g</sup> 7  
ignominiam ab infamia differre, vt ex

Cicerone satis cōstat<sup>h</sup>: qui dicit animad-

uersionem censoris non eam vim, quam res iudicata

habere. censoris enim iudicium nihil fere damnato adferre, quā

ruborem, & ignominia notare: quæ in nomine tantummodo versatur: & sic

notatis ad honorem aditum, & in curiā reditum esse: alias verò turpi iudicio dā-

gnitate priuari, & infamia notari. infamia enim non nisi per sententiā inferri potest<sup>i</sup>.

Sic ignominia missi olim non erant infames, donec prætoris edicto effecti essent infames<sup>j</sup>. Itaque ignominia illa dici potest, quam interpretes nostri

vocant

a l. 1. ff. de his qui not. inf.

b l. 3. C. de re milit. li. 12

l. 1. C. de his qui non impl.

Itsp. lib. 10.

c l. multes a. grum. §. missi.

§. ignominia. ff. de re milit. l. 2.

ff. de his qui not. inf. l. 2.

C. de re milit. lib. 12.

d in d. l. milites agrū. §. missionis.

ff. de re milit.

e in d. l. 2. §. ignominia.

ff. de his qui not. inf.

f l. 1. C. de his qui in exil. dati sunt.

lib. 10.

g de rep. lib. 4 apud Non. & in oratione pro Cluent.

h l. infamem.

ff. de pub. iud.

i l. 1. ff. de his qui not. inf.

vocant infamiam facti: infamia verò, quã  
 infamiam iuris appellant. Non ignoran-  
 8 dum quoque est\*, non solùm gregarium  
 militem, sed etiam centurionem, tribu-  
 num, imo etiam qui exercitui præest, li-  
 cet consularibus vtatur insigniis, igno-  
 minia causa ab imperatore mitti posse,  
 & ita missum nota infamiae laborare <sup>a</sup>.  
 Itaque C. Cæsar C. Anienum tribunum a l. 2. in pr.  
ff. de his qui  
not. inf.  
 decimæ legionis in præsentia exercitus  
 „ cum ignominia dimisit, his verbis: C. A-  
 „ niene, quod in Italia milites populi Ro.  
 „ contra rempubl instigasti, rapinasq; per  
 „ municipia fecisti, quodque mihi, rei que  
 „ publicæ fuisti inutilis, tuaque opera mi- b Ant. Hir.  
lib. 5. de bell.  
Hisp.  
c in d. l. 2. §.  
ignominia ff.  
de his qui  
not. inf.  
 „ litibus tempore necessario resp. careat,  
 „ obeas res, causa ignominia, ab exercitu  
 „ meo te remoueo, hodieque ex Africa a-  
 „ besse, & quanto longius potes, proficisci  
 „ iubeo <sup>b</sup>. Ultra hæc tria missionū genera,  
 9 quæ enarrauimus, Vlp. adiecit\* quartū <sup>c</sup>.  
 Si quis enim euitandorum munerū gra-  
 tia militiam subiit, exauctorari iubetur <sup>d</sup>.  
 quæ missio existimationem non lædit <sup>e</sup>.  
 10 Ceterum solus imperator\*, vel dux exer-  
 citus missionem dare potest <sup>f</sup>. Vnde Q.  
 Fuluius censor Fuluium fratrem cohortem  
 legionis, in qua tribunus militum <sup>g</sup>

DE IVRE ET OFF. BELL.

<sup>a Val. Max.</sup>  
<sup>lib. 2. cap. 7.</sup> erat, iniussu cōsulis domum mittere au-  
sum, senatu mouit<sup>a</sup>.

DE PRIVILEGIIS MILITVM.

- 1 Miles ex causa aris alieni in carcerem duci non potest.
- 2 An nobiles idem priuilegium habeant.
- 3 Priuilegium ne quis cōueniatur, nisi quatenus facere potest, quale sit.
- 4 Militis absentis bona creditoribus addicere non possunt.
- 5 Miles excusatur a tutela & a dicendo testimonio.
- 6 Res militis non cadit in commissum ob nō solutum vectigal.
- 7 Res empta pecunia militis, est militis.
- 8 Miles transfert onus probandi indebitum in aduersarium.
- 9 Militi non nocet iuris ignorantia.
- 10 Iuris ignorantia in delictis non excusat.
- 11 Miles non subijcitur quaestioni nec plebeiorum pœnis.
- 12 Militia non liberat filiū a patriapoteestate.
- 13 Filius familias miles, quoad castrense peculium, pro patrefam. habetur.
- 14 Quid censeatur castrensis esse peculij.
- 15 De testamentis militum.
- 16 Ex militari delicto capite damnatus testamentum

- mentum condere potest.
- 17 Bona militis, qui successorem non habet, deferuntur legioni.
- 18 Miles qui inconsulto adiit hereditatem, non tenetur ultra vires hereditarias.
- 19 Mulieri concubinae donare non potest.
- 20 Mortuus in bello in aeternum vivere intelligitur.
- 21 Miles in bello mortuus prodest patri ad ius trium liberorum.
- 22 Privilegia militum ad aliorum iniuriam non porriguntur.
- 23 Premia mortuis debita, dantur filiis.
- 24 Militaria privilegia ius tantum, qui strenue militant praestantur.
- 25 Non solum militibus, sed etiam aliis qui castra sequuntur, quaedam privilegia militaria conceduntur.
- 26 Mulieres quae castra sequuntur, quae privilegia habeant.
- 27 An milites nostri temporis gaudeant privilegiis militum.

## CAPVT VII.

CVM, vt rectè Cicero ait <sup>a</sup>, honos alatur <sup>a Tuscul. quest. ub. 1.</sup> artes, & omnes incendamur ad studia gloriae, iaceantque ea semper, quae apud quosque improbantur: prudenter pro-

DE IVRE ET OFF. BELL.

*à l. miles. l. l. rem miles. ff. de re iud. b. Dio. sicul. lib. 2. c. in §. sunt prateru. inst. de actioib. d. l. in condēuatione. ff. de reg. iur. l. in ser eos. ff. de re iudic. c. in d. l. miles. & Bald. in d. l. 1. in fi. C. Qui bo. ced. pos. Alex. in l. centurio. col. 5. in p. ff. de vulg. & pup. f. gloss. & DD. in d. l. miles & facit text. in l. ult. C. de test. mil. g. l. vi. C. ad S. C. Maced. h. l. alia cau. sa §. eleganter. & ubi Alex. ff. sol. mat. i. Dec. in l. Dimus. n. 8. ff. de reg. iur. k. Bald. in l. 1. in fi. C. Qui bon. sed. poss. Alex. in l. Centurio. ff. de vulg. & pup. sub. l. in d. l. miles. ff. de re iud.*

**fecto Romani (qui belli gloria præcipuè ad tantum fastigium peruenere) magno in honore disciplinam militarē habuere: vnde etiam militibus plurima & amplissima priuilegia concessere, quorū summa tātūm capita breuitatis causa hic perstringemus. Et in primis miles \* ex causa æris alieni in carcerem duci non potest: & non nisi quatenus facere potest, cōueniri<sup>a</sup>. quod & apud Egyptios lege cautū fuit<sup>b</sup>. non conuenitur, inquam, nisi quatenus potest, id est quatenus facultates eius patiuntur, vt ait Iustinianus<sup>c</sup>: habita scilicet ratione ne egeat<sup>d</sup>. vnde bonis cedere nō tenetur, vt est communis doctorum opinio<sup>e</sup>. Quod tamen ita plerique procedere arbitrantur, si debitum sit cōtractum in castris & ex causa militiæ<sup>f</sup>. quod in dubio præsumitur<sup>g</sup>. Et quidem huic priuilegio renunciari non potest<sup>h</sup>, cum personæ cohæreat, non cōtractui. Idem putant esse plerique in priuilegio eorum, qui<sup>i</sup> nobilitatis dignitate deco-<sup>2</sup> rantur<sup>k</sup>. Quod licet iure communi dubium sit, regia tamen Hispaniarum lege constitutum est in his, quos Hidalgos vocant<sup>l</sup>. Sed nec iure communi, nec Hispano, hi nobiles habent priuilegium ne conue-**

1 Reg. 44. & 5. tit. 2. l. 4. ord. et l. 69. Tauri.

conueniantur vltra , quàm facere possunt, cùm id nullibi expressum sit: sed tantùm ne ex causâ æris alieni in carcerem ducantur<sup>a</sup>. Arma tamen, & equi, & domus vbi hi nobiles habitant, oppignorari, vei in causam iudicati accipi nō possunt<sup>b</sup>: nisi forte regi quid debeat<sup>c</sup>. Iure quoq; communi, arma militū in causam iudicati accipi nō possunt<sup>d</sup>: idq; meritò: arma enim veteres mēbra militum esse dicebant. Sed nec in stipendia militum fieri debet executio, si aliūde potest creditori satisfieri<sup>e</sup>. Sciendum verò istud<sup>f</sup> priuilegium, ne quis conueniatur nisi quatenus facere potest, non esse obligationis, nec actionis, nec iudicati. nā actor potest solidum petere, sed iudex cōdemnabit tantùm in id, quod facere potest<sup>g</sup>. Et quamuis iudex per errorem condemnauerit in solidum, non potest actor iudicatū exequi, nisi quatenus reus facere potest<sup>h</sup>. eoque sensu dicitur spectari tēpus rei iudicatæ<sup>i</sup>. Vnde quamuis tempore sententiæ fuerit reus soluēdo, proderit nihilominus exceptio<sup>j</sup>. Porro fauore militiæ non solùm milites, sed nunquam etiam militare volentes, carceri soluti fuerunt, nam P. Seruilius cō-

a *Cinna. Et alij in d. l. miles. Et in d. l. centurio.*

b *Reg. l. 3. et 5. tit. 2. lib. 4. ord.*

c *Reg. l. 2. q. 2. et addit. tit. 2. part. 2.*

d *A. c. Et Alc. in l. nepos*

*Proculo. ff. de verb. signific.*

*Bald. in Rub. C. quis bo ced. poss. C. n. Et Salk. in l. 1.*

*C. d. t. col. 13 c. l. stipendia. C. de exec. rei red.*

*f. l. maritum. ff. sol. mat. l. verum. vers. condemnare.*

*ff. pro socio. gl. Nescimus ff. de re iudic.*

*h. l. rei iudicata. ff. sol. matrum.*

*i. l. verum. §. tēpus. ff. pro socio.*

DE IVRE ET OFF. BELL.

ful, Volscis bellum inferentibus, edixit, ne quis ciuem Romanum vincitum, aut clausum teneret, quo minus i nominis

**a** Liv. lib. 2. edendi apud consules potestas fieret<sup>a</sup>. & deinde M. Iunius dictator, post Cannensem cladem edixit, vt qui capitalem fraudem ausi, quiq; pecunia iudicati, in vinculis essent, qui eorum apud se milites fierent, eos noxa pecuniaque se exolui iussurum<sup>b</sup>. Superiori primæ legi affine est & istud\*, quod scilicet, si non defen-

**c** Ignorare. C. de rest. milit. **d** l. ult. C. de iur. dum. nup. **e** l. si cum militibus. C. de rest. milit. **f** late in tit. C. de rest. milit. **g** C. de rest. milit. **h** C. de rest. in integ. **i** C. de rest. **Qui non ob leg. i. p. pref.** **k** Liv. lib. 1. **l** §. idem **m** in iust. inst. **n** de excus. iust. **o** l. 3. §. his qui ff. de mun. et honor. **p** l. 3. §. ult. l. in iust. ff. de testib.

datur miles absens reipublicæ causa, possideri quidem eius bona ex causa iudicati possint, non tamen omnino creditoribus addici<sup>c</sup>. & si quidem creditores militis bona distraxerint, iure pignoris, secundum normam<sup>l</sup> restituetur miles, persoluto debito, vel refuso pretio vëditionis, si fortè minoris venit pignus quàm sit debitum<sup>e</sup>. miles enim dum reipublicæ operam suam præstare, quomodocunque læsus, in integrum restituitur<sup>f</sup>. Itaque P. Seruilius consul, bello Volscico edixit, ne quis militis, donec in castris esset, bona possideret, aut venderet<sup>g</sup>. Præterea miles excusatur a tutela<sup>h</sup>, & ab aliis muneribus publicis<sup>i</sup>. miles quoque non cogitur inuitus testimonium dicere<sup>k</sup>: ne propter priua-

priua-

priuatam vtilitatem cogatur abesse a si-  
gnis, vbi tuetur rempublicā vniuersam.

6 Item quamuis miles non sit liber \* a ve-  
ctigalibus<sup>b</sup>: non tamen cadent res suæ in  
commissum, ex eo quòd nō profiteatur,  
neque soluat vectigal<sup>c</sup>. Et quamuis res  
empta pecunia mea non sit mea<sup>d</sup>: res ta-

7 men emptā<sup>a</sup> pecunia militis, potest a mi-  
lite vëdicari<sup>e</sup>. Et licet ei qui se indebitas  
pecunias soluisse cōtendit; probatio in-

8 cumbat, miles tamen \* eo onere leuatur,  
quod in aduersariū transfert, qui se bene  
accepisse probare debet<sup>f</sup>. quod ita verū  
est, si totam summam indebitam esse cō-

9 taria, quod militi \* non nocet iuris igno-  
rantia, magis enim arma scire tenetur,  
quàm leges<sup>h</sup>. vnde permittitur militi, si

exceptionem peremptoriam per iuris  
ignorātiā non obiecit, vt eam post sen-

tentiam possit opponere<sup>i</sup>. idem consti-  
tutionibus regni Hispaniæ cautum est<sup>k</sup>.

10 non tamen excusat iuris ignorantia in  
delictis \*<sup>l</sup>: a quibus natura duce abstinē-

11 dum est. in eo tamē fauetur militi, quòd  
non subiiciatur quæstioni \*, nec plebeio-  
rum pœnis, etiamsi emeritis stipendiis  
missus

<sup>a</sup> l. miles.  
C. locati.

<sup>b</sup> l. ex pra-  
statione C. de  
vectigalib.

<sup>c</sup> l. 2 C. de  
vectigal.

<sup>d</sup> l. si ex ea,  
C. de i. ven.

<sup>e</sup> l. si ut pro-  
poni. C. de  
rei vendicat.

<sup>f</sup> l. cum de in-  
debito §. si  
autem is. ff.  
de cōd. indeb.

<sup>g</sup> d. §. si au-  
tem.

<sup>h</sup> l. regula.  
ff. de iur. &  
fact. ignorat.  
l. ult. ff. codē.

<sup>i</sup> l. 1. C. de iur.  
& fact. igno-  
rantia.

<sup>k</sup> Reg. l. 24.  
tit. 21 part. 2

<sup>l</sup> l. 2. ff. de re  
milit. l. miles.

in principio.  
ff. ad leg. iul.  
de adulter.

DE IVRE ET OFF. BELL.

missus sit<sup>a</sup>. itaque nec ad bestias, nec in  
 furcam damnari potest<sup>b</sup>. Idem in nobi-  
 libus locum habere voluit cōstitutio re-  
 gni Hispaniæ<sup>c</sup>. quod & in filiis militum,  
 & veteranorum locum habet<sup>d</sup>. Imo vsq;  
 ad nepotes exteditur, eorum scilicet qui  
 ad summum gradum militiæ peruene-  
 runt<sup>e</sup>. Non erit autem locus huic priui-  
 legio, si agatur ex causa criminis læsæ  
 maiestatis<sup>f</sup>, proditionis<sup>g</sup>, maleficij<sup>b</sup>, fal-  
 si<sup>i</sup>, vel privati carceris<sup>k</sup>. Porro quamuis  
 militia non liberet filium<sup>a</sup> a patria pote- 12  
 state<sup>l</sup>: tamen quod ad castrense peculiū  
 attinet<sup>m</sup>, habetur pro patre familias<sup>m</sup>: in 13  
 quo nihil iuris pater habet<sup>n</sup>. vsque adeo,  
 vt inter patrem & filium militem, quem  
 in potestate habet (inter quos alias nulla  
 lis esse potest) ex causa castrensis peculiij  
 sit actio<sup>o</sup>. Qua ratione etiam filius fami-  
 lias miles, ex quacūque causa pecuniam  
 creditam acceperit, non iuuatur S. C.  
 Macedoniano p. hinc quoque, quamuis  
 inter patrem & filium, quē in potestate  
 habet, donatio non consistat: q donatio  
 tamen a patre filio familias causa militiæ  
 facta valet, & datum efficitur castrensis  
 peculiij.

à l. miles. C. de quæstion.  
 l. nullus. C. ad l. lul. ma-  
 iest. c. miles de  
 pace tenend.  
 b l. 3. §. is  
 qui. ff. de re  
 milit.  
 c Reg. l. 24.  
 tit. 21. part. 2  
 d l. 1. et 3. ff.  
 de priu. vet.  
 e l. Diao  
 Marco. C. de  
 quæstion.  
 f d. l. nullus.  
 g l. 3. §. is  
 qui. ff. de re  
 milit.  
 h l. et si exce-  
 pta. C. de ma-  
 iest. & Maib.  
 i l. si quis de-  
 curio. C. de  
 fals.  
 k l. 1. C. de  
 priuat. carc.  
 l §. filius fa-  
 milias. instit.  
 Quomodo ius  
 patr. potest.  
 solu. l. erat. C.  
 de castrens. pe-  
 cul. lib. 12.  
 m l. vit. C. de  
 inoff. testam.  
 n l. miles præ-  
 cipuz. l. ex  
 nota. C. de  
 cast. pec.

o l. lis nulla. ff. de iud. p l. vit. §. penult. C. ad S. C. Macedo.  
 q l. 2. l. donationes. §. pater. ff. de donat.

peculij<sup>a</sup>. & ex eadem causa donatio inter virum & vxorem, quæ alioquin non va-  
 14 let<sup>b</sup>, consistit<sup>c</sup>. Castrensis verò peculij<sup>d</sup> censetur, quidquid filiusfamilias occasione militiæ acquisiuit<sup>e</sup>. Sed & hereditas vxoris, ex rescripto D. Hadriani militiæ affectione marito filiofamilias relicta, castrensis peculij erit<sup>f</sup>. quod tamen secus est in dote marito data, vel promissa, quæ cohærens matrimonij oneribus, liberis communibus, qui in aui sunt potestate, confertur<sup>g</sup>. Fratris quoque patruelis, vel alterius commilitonis hereditas commilitoni delata, iure castrensis peculij habetur<sup>h</sup>. Quod ita verum est, si in eadem prouincia militauerint, vel affectione militiæ relinquatur: alias secus<sup>i</sup>. Porro quod ad testamēta<sup>j</sup> militum attinet, tam larga illis testandi facultas permittitur, vt omnes omnino solemnitates, in testamentis requisitæ, illis remissæ sint. Nam D. Traianus permisit militibus, vt quoquo modo vellent, facerent testamenta, sufficereq; nudā voluntatem voluit<sup>k</sup>. vnde Papinianus respōdit, militis voluntatē esse testamētū<sup>l</sup>. Quod ita demum verum est, si dum in expeditione agunt, testentur<sup>m</sup>: & duobus ad hoc vocatis

a l. si melior.

b miles precipua. l. castrens.

c ff. de cast.

d ff. de cast.

e ff. de cast.

f ff. de cast.

g ff. de cast.

h ff. de cast.

i ff. de cast.

j ff. de cast.

k ff. de cast.

l ff. de cast.

m ff. de cast.

n ff. de cast.

o ff. de cast.

p ff. de cast.

q ff. de cast.

r ff. de cast.

s ff. de cast.

t ff. de cast.

u ff. de cast.

v ff. de cast.

w ff. de cast.

x ff. de cast.

y ff. de cast.

z ff. de cast.

aa ff. de cast.

ab ff. de cast.

ac ff. de cast.

ad ff. de cast.

ae ff. de cast.

af ff. de cast.

ag ff. de cast.

ah ff. de cast.

ai ff. de cast.

aj ff. de cast.

ak ff. de cast.

al ff. de cast.

am ff. de cast.

a §. caterū.  
iustus. de mi-  
lit. testa. l. di-  
uus l. Lucius.  
ff. de test. mil.  
b l. miles.  
ff. de test. mi-  
lit.  
c §. illū au-  
tem. inst. de  
milit. testa.  
d Reg. l. 4.  
tit. 1. par 6.  
e § post mis-  
sionem insti-  
tutionem de milite. test.  
l. testa. corū.  
ff. eodem tit.  
f l. si miles v-  
tū. ff. de test.  
milit. l. 1. et 2  
C. eod. titulo.  
g l. in frau-  
dem. §. miles.  
l. miles ita. ff.  
de milit. test.  
h l. si duo-  
bus. l. ex mili-  
tari. §. filiū.  
ff. de mil. test.  
i l. sicut cum.  
l. sequ. C. de  
milit. testa. l.  
qui iure mila-  
l. militis. §.  
miles. D. eod.  
k l. 2. § he-  
reditas. D. de  
iure codicil. l.  
hereditatem.  
C. de codicil.  
§. codicillis  
autē insti-  
tutionem.  
l. l. militis in co-

## DE IVRE ET OFF. BELL.

vocatis testibus voluntas militis probe-  
tur, quod in fauorem eorum inductum  
est<sup>a</sup>. in ipso tamen prælio testamentum  
militis factum valet, etiam nullo vocato,  
& sufficit si in clypeo, vel in puluere he-  
redem scribat<sup>b</sup>. sed citra expeditionis ne-  
cessitatem, tenetur miles iure communi  
testari<sup>c</sup>. quod & regia Hispaniarum lege  
decisum est<sup>d</sup>. In expeditione verò testa-  
mentum iure militari factum, valebit vs-  
que ad annum post missionem<sup>e</sup>. in quo  
tam laxa illi testandi, prout vult, permissa  
est facultas, vt pro parte testatus, pro par-  
te intestatus possit decedere<sup>f</sup>, & ad certū  
tempus possit heredem instituere, & po-  
stea hereditatem adimere, & alij directo  
dare, & si neminem vocauerit, legitimū  
heredes hereditatem capient<sup>g</sup>. neque  
iuri accrescendi locus erit in testamento  
militis<sup>h</sup>. Potest quoque miles filium si-  
lentione præterire in testamento, cuius  
præteritio pro tacita exheredatione erit,  
modo prudens id fecerit: vnde & agna-  
tione filij testamentum militis nō rum-  
pitur, si de mēte eius constet<sup>i</sup>. Et quam-  
uis in codicillis directo relinqui heredi-  
tas non possit<sup>k</sup>: militi tamen id permis-  
sum est<sup>l</sup>. Miles quoque incertus de statu  
suo

suo rectè testari potest<sup>a</sup>. & testamentum a pagano iure militari factum valet, si miles decedat<sup>b</sup>. Licet quoque nuda voluntate, vel cœpto tantū & non perfecto testamento non rumpatur testamentum pagani<sup>c</sup>: militis tamen testamētum nuda voluntate facile rumpitur<sup>d</sup>: licet etiā duob<sup>9</sup> testamētis validis miles decedere possit<sup>e</sup>. Præterea ultra dodrantē miles legare potest, & eius legata non minuūtur per Faicidiam<sup>f</sup>. Mutus quoque & surdus miles testamentum rectè facit<sup>g</sup>. & filiusfamilias miles de castrensibus iure testabitur<sup>h</sup>. quod etiam ad inermem militiā extenditur<sup>i</sup>. & testamenta militum non subiacent querelę inofficiosi<sup>k</sup>. neque solum sibi testamentum facere filiusfamilias miles poterit, sed etiam filio pupillares tabulas de castrensibus<sup>l</sup>. hoc tamen priuilegium testandi filiofamilias militi concessum, ad impuberes extendi non debet, qui forte fauore in militiā recepti sunt, quod fieri quandoque solet<sup>m</sup>. huic enim impuberi testari non licēbit, neque communi, neque militari iure, propter

lubricum

*flam. mil. §. quiniūdo inst. de milit. test.* h *l. ex militari. §. de testam. milit.* i *l. ult. D. de inoff. testa.* k *l. testamentum. l. ult. C. de inoff. test.* l *l. cum filiusfamilias miles. l. in fraudem. §. miles. D. de test. milit.* m *l. iud. & milites. D. de excus. tut.*

*dicillu. in prin. i. quare batur. D. de milita. testa.*

a *l. ex militari. §. miles. D. de testa. mil.*

b *l. in fraudem §. testamentum. D. d. tit.*

c *§. ex eo. in sit quib. mo. l. st. in fir. l. 2. D. de inuisto rup. vni. test.*

d *l. heres §. si quid post D. de testamens.*

e *l. in fraudem. §. sicut cū. §. seq. D. de malis testa.*

f *l. 1. et 2. D. de inuisto rup. & vni. testa. l. quare batur.*

g *in prin. D. de mil. test.*

h *l. si certarū. §. vlt. cum l. seq. D. de test. milit. l. in testamento militis. C. iudic.*

i *l. 1. D. ad l. Faicidiam.*

g *l. iure militari. D. de te*

DE IVRE ET OFF. BELL.

*a l. ult. C. de testa. milit.*  
*b l. ult. inst. de pupil. substit.*  
*c l. centurio. ff. de vulg. & pupil. l. in testamento. C. de milit. test. l. 5. §. miles in ta heredē. §. exheredato. D. eodem.*  
*d l. ex militari. D. de testa. milit. l. si quis filio. §. sed et si quis fuerit. D. de inest. rup. irrit. fac. test. c l. si quis. §. miles. D. de leg. 3. l. cum hic. §. si miles. D. de don. inter vir et vx. f l. eius qui. §. 1. C. ult. D. de testa. g l. 1. & 2. D. de ver. milit. suc.*  
*h l. si quis filio. §. eius qui. D. de inest. rup. irrit. l. 2. c. de hered. decem.*  
*i l. ult. in fi. C. de iure delib.*

lubricum illius ætatis consilium, qua de causa Iustinianus ius antiquum, quo id licebat, correxit<sup>a</sup>. Præterea licet paganus extraneo, vel filio puberi heredi instituto ita substituere directo nõ possit, si heres exstiterit, & intra aliquod tēpus decefferit, alius ei sit heres: sed tantum per fideicommissum testator heredē obligare possit, hereditatem vel totam vel partem restituere<sup>b</sup>: id tamen militi concessum est<sup>c</sup>. Porrò ex militari delicto capite\* damnatis testamentum condere li- 16  
 cet, de bonis scilicet castrensibus, & ita si sacramenti fides rupta non sit<sup>d</sup>: & permittente in sententia eo qui damnauit<sup>e</sup>. quod secus est in pagano<sup>f</sup>. Et quidem ex militari delicto damnati, si intestati decedant, succedent proximi ab intestato excluso fisco<sup>g</sup>, bona verò militis\*, qui 17  
 successorem non habet, deferuntur legioni non admisso fisco<sup>h</sup>. Miles denique qui inconsultò adiit hereditatem\*, non 18  
 tenetur ultravires hereditarias<sup>i</sup>. Ceterū fauor militum non semper in extendēda testandi facultate, sed aliquando etiam in restringenda consistit. Itaque quamuis concubinæ vel meretrici testamento quid relinquere vel donare permissum sit:

sit: miles tamen mulieri, in quam turpis  
 19 cadit suspicio\*, nihil donare vel testamē-  
 to relinquere potest<sup>b</sup>. Militis quoq; di-  
 spositio, quæ vel turpis, vel bonis mori-  
 bus contraria est, nihilo magis quàm a-  
 licuius pagani valebit<sup>c</sup>. Superioribus  
 adde singulare & præclarū militare pri-  
 20 uilegiū, quòd scilicet mortuus in bello\*  
 pro repub. per rerum gestarum gloriam  
 in æternum viuere intelligitur: modo in  
 acie & in conflictu moriatur; non etiam  
 in obsidione, vel alias ex causa belli. itaq;  
 filius familias miles, qui in acie pro re-  
 pub. pugnās cecidit, prodest patri ad ius  
 21 trium liberorum\*, quòd eum a tutela ex-  
 cusat<sup>d</sup>: & aliorum munerum excusatio-  
 nem præbet<sup>e</sup>. Itaque cùm lege Iulia de  
 maritandis ordinibus cautum esset, vt  
 priori ex consulibus fasces sumendi po-  
 testas esset, qui plures liberos quàm col-  
 lega in potestate haberet, eorum quoq;  
 ratio habita fuit, qui bello amissi essent<sup>f</sup>.  
 idq; ad multa alia adaptari posse videtur.  
 atque ita si forte statuto cautum sit, vt  
 certè multis locis est, vt filius secundò  
 genitus patri superstes, in successione e-  
 iusdem patris præferatur nepoti ex filio  
 primogenito mortuo ante patrē: si filius  
 b ille

a l. affectio-  
 nis. l. donatio-  
 nes. D. de do-  
 nat.

b i. miles. §.  
 mulier. D. de  
 milit. testamē-  
 t. mulierē. D.  
 de his quib. vt  
 indig. l. i. C.

c l. si a milite  
 §. edictū præ-  
 toris. D. de  
 milit. testa.

d. l. bello a-  
 missi. D. de  
 excusat. tut. §.  
 filij autē. in-  
 stit. de excus.  
 tut.

e l. vlt. D. de  
 vac. et excusi-  
 mun.

f Gell. l. 2. c.

15.

DE IVRE ET OFF. BELL.

ille primogenitus in acie pro repub. cecidit, putarem hoc casu nepotem præferendum: quia scilicet pater eius censetur in æternum viuere, cui successio aui iure primogenituræ debetur. & ita in prorsus simili facti specie iudicatum fuisse accepi. non obstat quòd priuilegia militum \* ad alienam iniuriam porrigi non 22

a l. impuberi.  
D. de adm. & per sus.

b l. sed cum.  
D. ad S. C. Treb. l. nec a-  
uus. C. de e-  
manc. l. re-  
scripta C. de  
prec. imp. off.  
l. imperatores  
D. de ser. rus.  
pre.

c l. nō vidē-  
tur. D. de reg.  
iur.

d l. nō potest.  
D. de reg. iur.

e in l. non  
fraudentur.  
D. de reg. iur.  
l. qui autem.  
in princ. D.  
que in frau-  
credito.

f d. l. impu-  
beri. D. de  
adm. & per  
sus.

debeant a. & beneficia in damnū alterius neque porrigi, neque conferri solent b. nam nulla iniuria hic inferitur filio secū- dō genito, cui nihil adimitur, sed tantum non acquiritur. non enim, vt Vlpianus respondit, videtur rem amittere, quibus propria non fuit c. & ex regula Pauli, nō potest videri desisse habere, qui nunquā habuit d. Quò spectat quod Vlpianus ait, non fraudari creditores, cum quid nō acquiritur a debitore, sed cum aliquid de bonis suis diminuitur e. Sed & quod Papinianus respondit, militum priuilegia ad alienam iniuriam non porrigi, nō ita huc facit: nam loquitur in casu, ad quem militis priuilegium non extenditur, & quo evidens fieret iniuria alteri f. Itaque in proposita facti specie nepotem patruo in successione aui, non obstante statuto, præferendum existimo: cum & iure

iure communi nepos in parentis sui locum, etiam extra bellum mortui, succedat<sup>a</sup>. vnde etiam statutum iure cōmuni contrariū quàm strictissimè intelligi debet<sup>b</sup>. His adde lege regia Hispaniæ statutum esse, vt præmia\*, quæ forte quis meruit ob egregiam operam in bello præstitam, eo mortuo debeantur filiis & proximis agnatis<sup>c</sup>, quod & a Romanis obseruatum fuit, & lege Solonis apud Athenienses cautum fuit: vt illorum filij, qui occubuissent in bello, publicè alerentur, & bonis disciplinis imbuerentur. Constātinus verò filios in paternam vocari militiam voluit<sup>d</sup>. Sciendum porrò

24 militaria hæc priuilegia\* non aliter concedi militibus, quàm si fortiter & strenuè militent<sup>e</sup>, & ad veteranos non extendi<sup>f</sup>: quamuis & veterani sua habeant priuilegia<sup>g</sup>. In classibus verò remiges & nautæ sunt milites, & militari priuilegio fruuntur<sup>h</sup>. Præterea nō solum militibus,

25 sed etiam aliis\*, qui castra sequuntur, militaria quædam priuilegia conceduntur. & in primis omnibus omnino qui sunt eius gradus, vt iure militari testari non possint, si in hostico deprehendantur, quomodo velint & quomodo possint

b 2      testa-

de exc. tur.    h l. unica. §. in classib. D. de bon. poss. ex test. milit.

a §. cum fili-  
lus. inst. de  
hered. quæ ab  
intest. dese.  
b Panor. in c.  
ex parte. ex.  
de decum. tex.  
in c. 1. in fin.  
de filij pres-  
byt. lib. 6.  
c Reg. l. 5. tit.  
27. par. 5.  
d l. 1. §. 2.  
C. de filij,  
off. milit. l. 12  
e l. vlt. C. de  
restit. milit. l.  
cum de inde-  
bitis. §. sin  
autem. D. de  
probat.  
f l. idem est,  
et si testamē-  
to. c. in l. seq.  
in prin. ff. de  
milit. testa. l.  
vlt. §. quis  
militibus. C.  
de inof. testa.  
l. ad veterani  
D. ad l. Falc.  
l. filij. §. ve-  
terani. cū §.  
sequi. D. de  
proc.  
g tit. D. de  
priuileg. veter. l.  
1. et 2. D. de  
vet. mil. succ.  
l. 1. 2. 3. 4. C.  
de vetera. l. 12  
§. illi. inst. de  
mil. test. l. sed  
et milites. D.

DE IVRE ET OFF. BELL.

a l. vit. D. de milit. testa. testabuntur<sup>a</sup>. Itē mulieribus\*, quæ cum **26**  
b l. i. C. de vxor. milit. maritis absunt in bello reipubl. causa, in  
 actionibus temporalibus, si exclusæ fue-  
 rint, ad exemplum militum subueniri so-  
 lere Alexander rescripsit<sup>b</sup>. & Diocletia-  
 nus & Maximinianus mulieri, quæ in ex-  
 peditione fuit cum marito, non officere  
c l. 2. C. de vxor. milit. lōgi temporis præscriptionem rescripse-  
 runt<sup>c</sup>. Quò spectat quod Ulpianus re-  
 spondit, bello amissos ad tutelæ excusa-  
 tionem prodesse, cuiuscunque sexus vel  
 ætatis sint, modò in acie perierint. ete-  
 nim mulieres in acie versari solitas, & e-  
 gregiam nonnunquam in bello operam  
 præstitisse in veterum historiis satis ob-  
 uium est. itaque bello Sabino mulieres  
 Sabinæ, quæ Romæ erant, quarum ex in-  
 iuria bellum ortum erat, crinibus passis,  
 scissaque veste, victo malis muliebri pa-  
 uore, ut inquit Liuius<sup>d</sup>, ausæ se inter tela  
d lib. 1. volitantia inferre, ex transuerso impetu  
 facto, dirimere infestas acies, dirimere i-  
 ras. Estque memorabile, quod de Cim-  
 bricis mulieribus memoriæ proditū est,  
 cum quibus non minor quàm cum ma-  
 ritis eorum Mario pugna fuit: & specio-  
 sior mors earum fuit, quàm pugna. nam  
 cum missa ad Marium legatione, liber-  
 tatem

tatem non impetrassent, suffocatis elisif-  
 que passim infantibus, mutuis vulneri-  
 bus conciderunt, aut vinculo e crinibus  
 suis factó, ab arboribus iugisq; plaustro-  
 rum pependerit <sup>a</sup>. Apud Germanos  
 verò femina nō semel inclinam aciem  
 restituisse feruntur <sup>b</sup>. Ceterum licet a  
 plerisque dubitarum sit, vtrum milites  
 27 nostri temporis \* gaudeant hisce priui-  
 legiis militaribus, tamen verius est, mili-  
 tibus, qui in numeros sunt relati, & for-  
 titer & strenuè militant, hæc priuilegia  
 concedi, saltem ea quæ vsus nō coarguit.  
 neque refert, quod quædam solēnitates,  
 quibus olim milites sacramento militiae  
 ascribebantur, exoleuerint. Nam simili-  
 ter videmus solennitatem actionum an-  
 tiquam nostra tempestate nullam esse <sup>c</sup>:  
 cum tamē eiusdem nihilominus sint ef-  
 ficaciae <sup>d</sup>. Causa quoque & ratio conce-  
 dendi militibus tā ampla priuilegia fuit,  
 vt pro tutela & defensione Romani im-  
 perij omnibus soluti curis expeditissimi  
 operam armis darent <sup>e</sup>. quæ & nostris  
 militibus conuenit: ergo idem ius quo-  
 que manere debet <sup>f</sup>. & hæc sententia etiā  
 viris doctissimis probatur <sup>g</sup>.

b 3

DE IV-

centurio. m. 23. D. de vul. & pup. Decius in Rubr. C. de mi u test.  
 quos refert Francisc. Zoannest. de Roma. imp. m. 80.

a l. Flo. de  
 gest. Rom. l. 3  
 cap. 3.

b Crinit. de  
 honest. disc.  
 lib. 12 c. 8.

c l. 2 §. dein-  
 de ex his l. qj-  
 gib. D. de o-

rig. iur. l. 1. &  
 2. C. de form.  
 & impet. sub.

d l. actio. D.  
 de neg. gest.  
 facit l. ordo.

D. de publ. in-  
 dic. l. decreto.

C. ex quibus  
 causis. ff. iro.

e l. advocati.  
 C. de aduo.  
 diuers. iud. l.

militem. in fi.  
 C. de proc. l. c  
 D. de mil. test.

l. milites. C.  
 locati.

f l. illud que  
 situm. in prin.  
 D ad l. Aquil

g iacob. de  
 Raven Cyn.  
 Bald. Bar.

Saluet. & a-  
 lij in l. 1. C.  
 de iur. & fac.

igno A. d. m. l.  
 militem. C. le  
 proc. Rom. si-  
 ui. 43. & cii-

cit. 506. Ale-  
 xander in l.

DE IVRE ET OFF. BELL.  
DE IVDICIIS MILITARIBVS.

- 1 Miles non nisi ante suum iudicem conueniri potest.
- 2 Fallit in milite desertore.
- 3 Item in eo qui pactus est se non usurum fori præscriptione.
- 4 Item in eo, qui postquam in ius vocatus est, miles esse cæpit.
- 5 Item in eo qui falsum testimonium dixit.
- 6 Item in milite negociatore.
- 7 Consules Romani, non nisi in castris in caput eius Rom. incōsulto populo, animaduertere poterant.
- 8 Tribuni non habuerunt vitæ necisq; potestatem in milites.

CAPVT VIII.

**M**ilites\* non nisi ante suum iudicem <sup>1</sup> conueniri possunt, nec si in culpa sint, coërceri<sup>a</sup>. vnde capti a præside ad proprium iudicem remitti debent<sup>b</sup>, nisi forte in desertione agens\* miles com- <sup>2</sup> miserit delictum valde enorme, de quo præses prouinciæ cognoscere poterit, & punire militem in loco delicti<sup>c</sup>. alioqui verò neque dux exercitus, vel magister militum in prouinciales, neque præses prouinciæ in milites vllam iurisdictionē habent.

a l. magiste.  
C. de iurif.  
vno. iud. l. 1.  
C. de exhib.  
reō.  
b d. l. 1.  
c l. desertorē.  
D. de re milit.  
l. 1. C. vbi se  
nat. vel clar.  
l. vlt. D. de  
accus. l. mili-  
tibus. D. de  
cōst. reo. l. 1.  
C. de falsi.  
morz.

- habent. si tamen miles in instrumento
- 3 professus fuerit\*, se non vsurum fori præ-  
 scriptione propter cingulum militiæ, pa-  
 ctum seruandum erit<sup>a</sup>. Sed & si quis, po-  
 4 steaquam\* in ius vocatus est, miles esse  
 cœpit: in ea causa est, vt ius reuocandi  
 forum non habeat, quasi præuentus<sup>b</sup>.  
 nam vbi lis cœpta est, ibi finiri debet<sup>c</sup>.
- 5 Præterea miles\*, qui falsum testimoniũ  
 dixit, subiicit se iurisdictioni illius iudi-  
 cis, etiam si paganus sit<sup>d</sup>. Miles quoque  
 6 negociator\* subest iudici illius negocia-  
 tionis\*. Porrò vnusquisque super causis  
 publicis, quas dum militaret exercuit, &  
 super ratiociniis militaribus in militari  
 iudicio respondere debet, nec fori præ-  
 scriptione vti potest: etiam si militiæ cin-  
 gulum deposuerit<sup>e</sup>. & capitalis criminis  
 reus, volũtarius miles (qui ex D. Traiani  
 rescripto capite puniendus est) non est  
 remittendus eò, vbi reus postulatus fuit,  
 sed vbi accedente causa militiæ audiendus  
 est, puniri debet<sup>f</sup>. Sciendum autem est,  
 quamuis lege Valeria, quã Valerius pu-  
 blicola tulit, & L. Portia cõsulibus pro-  
 7 hibitum esset\*, ne in caput ciuis Romani  
 iniussu populi animaduertere possent, &  
 solùm illis relictũ esset, vt coërcere pos-  
 sent,

a l. si quis.  
C. de pact.

b l. si quis  
postea. D. de  
iudic.

c l. vbi cre-  
ptum. D. de  
iudic.

d l. nullũ. C.  
de testibm.

e l. vlt. D. de  
iuris. om. iud.

f l. 2. C. vbi  
de ratio. tam  
pub. quã priu.

g l. qui cum  
vno. § vlt.  
D. de re miot.

DE IVRE ET OFF. BELL.

*a in l. 2. §. in* sent, & in vincula publica duci iubere <sup>a</sup>:  
*initio. D. de d-* in castris tamen ius habebant arbitrato  
*rig. iur. Dion.* suo supplicium sumere <sup>b</sup>. quod & præto-  
*Hal. lib. 10.* ribus, aliisque ducibus exercituum per-  
*b Poly. lib. 6.* missum fuit <sup>c</sup>. id tamen Venuileius I. C.  
*de remilit. ac* ad milites caligatos tantum restrinxisse  
*domest. Rom.* viderur <sup>d</sup>: qui erant abiectiores & vilio-  
*c I. iunus l. 2.* res <sup>e</sup>. Vnde videtur inferri, quod in alios  
*¶ 4. Cicero* incōsulto principe animadverti nō pos-  
*Philop. 3.* sit. & quidem tribuni <sup>\*</sup>, aliique duce in- 8  
*d l. de militi-* feriores, vitæ necisque potestatem non  
*bis. D. de* habuerunt in milites, sed tantum levis  
*cust. et exhib.* coërcitio illis permessa est. id quod Mar-  
*reo.* cianus satis indicasse videtur <sup>f</sup>, cum ait:  
*c Auth. quib.* Tribuni officium esse delicta secundum  
*mod. nat. eff.* suæ auctoritatis modum castigare: cui  
*legit. §. quis-* cōuenit, quod Tacitus ait <sup>g</sup> de seditione  
*quis.* illa Pannonica, scribens, Municipiū præ-  
*f in l. officiū.* fectum castrorum, penes quem erat tum  
*in fin. D. de re* summa rerum, absente duce, cœptam se-  
*miit.* ditionem sedasse, duorum militum sup-  
*g annal. l. 2.* plicio: bono magis exemplo quam con-  
 cessio iure. Ceterum quod ad militaria  
 iudicia attinet, ex D. Traiani rescripto  
 etiam diebus feriatis peragi possunt <sup>h</sup>.  
*h l. Diuus.*  
*D. de feriis.*

DE POENIS MILITVM.

1 *Duplex causa in puniendis peccatis.*

2 *Pœna*

- 2 *Pœna militares.*
- 3 *Militum delicta aut propria, aut cõmunia.*
- 4 *Fustuarium quid.*
- 5 *Decimatio.*
- 6 *Romani militaribus pœnis asperi.*
- 7 *Capitalis pœna per vinum aut lasciuiam lapsis remittitur.*
- 8 *Romani in iudicãdo beneficia cum delictis non compensabant.*
- 9 *Contrà Persæ.*

## CAPVT IX.

- 1 **D**Vplicem\* in puniēdis peccatis causam esse cēset Plato in Gorgia, vt refert Gellius<sup>a</sup>: vnā castigādi & corrigēdi a not. Att. l. 6. cap. 14. eum qui peccauit, quò attentior fiat, & ad bene viuendum promptior. quòd in minoribus delictis fieri solet pecunia, vel leui cõerctiõne, multa dicta. alteram exempli causa, vt alij a similibus delictis metu pœnæ deterreantur: quod in grauioribus delictis fieri publicè interest.
- 2 Itaque pœnæ militares\* nonnullæ maiores, quæ capitis supplicio luebantur: aliæ minores, prout grauius aut leuiter delictum esset, delinquentibus militibus, necessariò ad disciplinam militarem stabilendam, a ducibus inferri solent. mi-
- b 5          litum

DE IVRE ET OFF. BELL.

litum autem delicta \* aut propria sunt, 3  
aut communia. Proprium militare de-

a l. 2. D. de  
ve milit.

b l. omne de-  
lictū. D. dere  
milit.

c in l. 3. Pœ-  
ne. D. dere  
milit.

d d. l. 2. §.  
pœna. Et §. in  
quis. D. dere  
milit.

e l. moris. §  
ille. D. de pec.  
l. honor. C. de  
pen. o. i. s. de  
privil. militū.

f d. l. 3. §. in  
bello. D. de re  
milit.

g de Rom.  
castrani.

lictum est, quod quis ut miles admittit<sup>a</sup>:  
si puta aliter faciat, quàm disciplina mi-  
litaris exigit<sup>b</sup>. Pœnæ verò militares, ut  
ait Modestinus<sup>c</sup>, sunt huiusmodi: casti-  
gatio, pecuniaria multa, munerum indi-  
ctio, militiæ mutatio, gradus deiectio,  
ignominiosa missio, in metallum autem  
non dantur, nec torquentur, nec ad be-  
stias, nec in furcam damnantur<sup>d</sup>, nec ple-  
beiorum pœnis subijciuntur<sup>e</sup>. At ex graui  
delicto solent milites capite puniri<sup>f</sup>, aut  
fuste percuti. id supplicium<sup>g</sup> huiusmodi 4  
erat, ut refert Polybius<sup>g</sup>, accepto fuste  
tribunus vix tantum attingebat damna-  
tum: quod ubi factum erat, omnes qui in  
castris erant, cædentes fustibus, lapidi-  
busque, plerosque in ipsis castris confici-  
ebant: at si qui euassissent, ne sic quidem  
feruari poterant, quibus nec in patriam  
redire licebat, neque aliquis ex necessa-  
riis domi eum recipere audebat, unde  
penitus peribant, qui in talem calamita-  
tem incidissent. hoc genus animaduer-  
sionis fustuarium dicebatur, teste Cice-  
rone<sup>h</sup>, cum ait: Fustuariū meruerunt le-  
giones, quæ consulē reliquerunt. Simile

pœnæ

h Philip. 3.

pœnæ genus etiam num hodie in castris  
 in vsu est. De hac pœna censent I. C. cùm  
 dicūt, fuste percuti, occidi, animaduertia,  
 Alioqui verò, cùm dicunt fustibus cædi,  
 castigari, admoneri<sup>b</sup>: non de capitali,  
 sed de leuiori pœna agunt. nam multo  
 leuiorem esse fustium, quàm flagellorū  
 pœnam iudicat Marcellus<sup>c</sup>, Calistratus<sup>d</sup>,  
 & Hermogenianus<sup>e</sup>: vt annotauit Hie-  
 ronymus Verrutius<sup>f</sup>. Porrò si multi mi-  
 lites in aliquod flagitium conspirent, vel  
 si legio deficiat, exauctorari solent<sup>g</sup>. nō  
 nunquam auctores turbarum ad palum  
 deligare, aut securi percutere, reliquæ ve-  
 ro multitudinis decimum quemq; sorte  
 5 ductum\* ad suppliciū petere peruulgata  
 pœna fuit. quod ex verbis Ciceronis  
 pro Cluētio intelligi potest, vbi inquit:  
 Statuerunt maiores nostri, vt si a multis  
 esset flagitiū rei militaris admissum, sor-  
 titione in quosdam animaduertetur,  
 vt metus videlicet ad multos, pœna ad  
 paucos perueniret. Inter alias quoque  
 pœnas militares fuerunt hæ: stipendium  
 anni differre militibus, neq; his æra pro-  
 cedere, qui ære diruti dicebantur, aut in  
 politia, aut in frequentia notare, vel citra  
 commoda stipēdiorum exauctorare, lo-  
 cum in

a vt in l. 7.

§. 1. D. ad l.

Aquil. l. 1. §.

occisorum. D.

ad S. C. Syl-

lianum. in l. 8

§. 1. D. de

pœn.

b vt in l. 1. §.

c in patro-

nus D de cf-

fic. pref. urb.

l. vit. D. de

iniuriis. l. 7.

D. de pœn. l. 3

§. 1. & l. vit.

D. de offic:

pref. vig. l.

10. & l. 28.

§. 1. D de

pœn. l. 3 §. in

bello. D. de re

milite. l. 1. C.

de his qui

not. in fa.

c in l. in seruo

rū D. de pœn.

d in l. capita-

liū §. nō oēs.

D. de pœn.

e in l. vit. D.

de inur.

f de verb. si-

gnif lib. 6.

g l. 3. in fin.

D. de re milite.

DE IVRE ET OFF. BELL.

cum in quo tenderent in castris adimere, ut humi ac sub dio accubarent, extra vallum sine tentoriis relinquere, vitibus cædere, hastas dare iubere, quæ censio hastaria dicebatur, quæ non pro leui noxa, sed pro graui delicto animaduersionis loco a ducibus inferri solita est. Hastas autem dare iuebantur milites, quibus propter probra ignominia & luxurie hasta adimebatur. etenim sicut glorie causa, fortes viri donabantur hasta pura, hi qui primū victores in prælio fuissent: ita ignavis & cõtumacibus adimebatur. hoc notabat, tanquam spes merendi illis adempra foret. in politia & in frequetia notabantur hi, qui rudibus, aut parum nitidis armis, vel strigosiore equo, & macie confecto utebantur, qui que prædicto ad pugnã die, occasionibus quæsitis contumacius parerent<sup>a</sup>. Fuit quoque antiquus militaris animaduersio, iubere ignominia causa venam militi solui, & sanguinẽ mitti. quod A. Gell<sup>b</sup>, primùm in militibus stupentis animi, atque a naturali habitu declinantis (ut non tam poena, quàm medicina videretur) factũ fuisse credit: postea verò etiam ob pleraque alia delicta factitatum esse per consuetu-

<sup>a</sup> Alex. sb A. lex. lib. 2. general. dic. c. 13

<sup>b</sup> noel. Attic. lib. 10. cap. 8

suetudinem : quasi minus sani viderētur  
 omnes qui delinquerent. Ceterum, quā-  
 uis alioqui Romanis mitiores poenę pla-  
 cuerint : apud quos antiquitus cautum  
 fuit, ne quis multam indicendo, bouem  
 priusquam ouem nominaret, grauiorū  
 enim multarū æstimatio bos erat vnus,  
 vel plures; minorum verò ouis: in mili-  
 6 taribus tamen poenis seueriores semper  
 fuere\*; quòd aspero & abscisso castiga-  
 tionis generē disciplina militaris indi-  
 geat. Vnde quamuis consulibus prohi-  
 bitum esset, ne possent animaduertere  
 in caput ciuis Romani, in castris tamen  
 poterant pro arbitratu suo supplicium  
 sumere: vt alibi diximus<sup>a</sup>. Hinc quoque  
 perrarò bis delictum imperatores venia <sup>a 5. de iuda  
milit.</sup>  
 dignum putauere. Nam, vt M. Cato in li-  
 bro de re militari scripsit, aliis in rebus  
 errata postmodum corrigi possunt; in  
 bello autem delicta emendationem non  
 accipiunt: quippe cū poena ipsa e ve-  
 stigio errorem sequatur. præsto enim est  
 ignauię, aut imperitię vltor, qui nunquā  
 delinquenti hosti indulget. & Lisima-  
 chus summus dux dicere solet, non esse  
 in bello bis errare, vbi si quid offenditur  
 perperam temeritate, vel inscitia, emen-  
 dari

DE IVRE ET OFF. BELL.

uari non potest. nam parua in bello of-  
fensa, magnarum sæpe rerum momenta  
facit. Nihilominus tamē quædam delicta  
pagano aut nullam, aut grauiorem pœ-  
nam irrogāt : militi verò grauiorem, aut  
leuiorem : vt Marcellus respondit <sup>a</sup>. &  
quidē constat, nonnulla militaria delicta  
capite puniri, quæ non nisi culpa contra-  
huntur <sup>b</sup>. Capitalis tamen pœna per vi-  
num, aut lasciuiam lapsis \* remittitur, & <sup>7</sup>  
militiæ mutationem irrogat <sup>c</sup>. voluntas  
enim & iudicium, quod nullum in ebrio  
est, distinguit maleficia <sup>d</sup>. Itaq; Pyrrhus  
adolescētes, qui inter bibendū regē con-  
uiciis & maledictis onerauerāt, ingenuè  
id fatentes, & culpam omnem in temu-  
lentiam coniicientes, cū dicerent se  
longè plura dicturos fuisse, si plus vini  
habuissent, imo ipsum regē interfectu-  
ros, nisi lagena defecisset, innoxios dimi-  
sit <sup>e</sup>. Carolus tamen V. imperator edicto  
cauit, ne cui ebrietas in delictis excusa-  
tionem præberet, propter nimiā in hisce  
regionibus inebriandi frequentiam. &  
Pittacus legem tulit, qua ei, qui per e-  
brietatem deliquerat, duplam eius, quæ  
<sup>f</sup> sobrio infligeretur, pœnam constituit <sup>f</sup>.  
Est porrò valde memorabile, quod Ro-  
mani,

<sup>a</sup> in l. quædā  
delicta. D. de  
penis.

<sup>b</sup> vt in l. om-  
ne delictū. §.  
1. cum duob.  
seqq. d. qui cō-  
mensus. §. 1.  
D. de remisit.

<sup>c</sup> d. l. omne  
delictū. §. per  
vinum.

<sup>d</sup> l. i. D. ad l.  
Corn. de sica.

<sup>e</sup> Val. Max.  
lib. 5. cap. 1.

<sup>f</sup> in con.

mani, qui alioqui maximam meritorum  
 cuiusque, & virtutis rationem habuerūt,  
 8 in iudicando tamen \* non solent, etiam si  
 maxima rei in remp. extitissent merita,  
 vero crimini indulgere, aut beneficia cū  
 delictis compensare. cuius rei fidem facit  
 in primis P. Horatius, qui trigemina  
 spolia Cuiatiorum victor præ se gerens,  
 quique imperium populo Rom, solus  
 sua virtute pepererat, perduellionis reus,  
 quod sororem ob mortem spōsi Cuiatij  
 flentem transfixerat, in maximo disci-  
 rmine fuit: plusque ad salutē ipsius pro-  
 fecerūt preces, & miseratio patris, quàm  
 recens rei beneficium <sup>a</sup>. Item M. Manlius <sup>a Liuii lib. 1</sup>  
 Capitolinus regni affectati reus, quāuis  
 defenso Capitolio Romam seruasset, &  
 prope cccc. produxisset, quibus sine fœ-  
 nore expensas pecunias tulisset, quorum  
 bona venire, quos duci addictos prohi-  
 buisset: ad hæc hostium cæsorū spolia,  
 dona imperatorū plurima conspicienda  
 protulisset, & ea quæ bello gessisset ora-  
 tione magnifica facta dictis æquādo me-  
 morasset: nihilominus tamen crimē va-  
 luit, inquit Liuius <sup>b</sup>, & populi iudicio dā- <sup>b lib. 6.</sup>  
 natus Manlius, de saxo Tarpeio deiectus  
 9 est. Contrà Persę\* nunquam quemquam  
 condem-

DE IVRE ET OFF. BELL.

<sup>a</sup> Diod. Sicul.  
lib. 1.

condemnabant, nisi reus conuinceretur plus mali quàm boni fecisse reipub.<sup>a</sup>

DE CONTVMACIBVS ET DV-  
CVM DICTO NON PARENTIBVS  
eosq; non protegentibus.

- 1 *Qui edicto non paret, capite punitur.*
- 2 *Miles qui tribuno, vel centurioni castigare volenti resistit.*
- 3 *Tribuno non licet modum in castigando excedere.*
- 4 *Qui præpositum defendere noluerunt, vel deseruerunt.*
- 5 *Qui rem a duce prohibitam facit.*
- 6 *Disciplina castrorum Romanis antiquior, quàm charitas liberorum.*

CAPVT X.

<sup>b</sup> l. 3. §. in  
bello. D. de re  
milit.

**A**D stabiliendam disciplinam militarē in primis spectat, vt exercitui & militibus præpositi, habeant milites dicto audientes. Itaque qui edicto minus paret\*, capite puniri iubetur<sup>b</sup>. Augustus verò decimam legionem contumacius parētem, cum ignominia totam dimisit. Porrò vt ordine, ac sine tumultu omnia in agmine, ad nutum imperiumque ducis fierēt, optimè prouidit L. Æmilius Paulus, in Macedoniam missus.  
nam

nam cum omnibus simul pronunciaretur, si quid agendum esset, neque omnes exaudirent, & incerto imperio accepto, alij plus eo quod imperatum esset, alij minus facerent, clamores quoque dissoni orirentur omnibus locis, & prius hostes quam ipsi, quid pararetur, sciret: placuit trib. militum primo pilo legionis secretum edere imperium: illum, & deinde singulos proximo cuique in ordine centurioni dicere quid facto opus esset: siue a primis signis ad nouissimū agmē; siue ab extremis ad primos perferendum imperium esset<sup>a</sup>. At verò tribuno, & centurioni permissam fuisse castigationem

2 in milites alibi diximus<sup>b</sup>. Itaque miles<sup>c</sup>, qui tribuno vel centurioni castigare volenti restitisset, probro notabatur: qui verò probro notabatur, eū nemini igne, nemini alloquio impartire licebat. qui vero vitem tenuisset, militiam mutabat: si ex industria fregisset, capite plectebatur<sup>c</sup>. Tribunis autē vites prælatas fuisse, non virgas alibi ostendimus. Cauendum

3 tamen tribuno<sup>\*</sup>, ne modum in castigando excedat<sup>d</sup>, & si iniuste militem inuadat, & non castigandi animo ob crimen aliquod metas officij sui excedat, puto

c            militi

a Liv. lib. 34

b 3. de offic. tribu.

c l. miles. §. irreuerens. D. de re milit.

d l. officium. in fin. D. de re milit. l. si queritur. §. item iulianus D. locati.

DE IVRE ET OFF. BELL.

*a* argumento *l. prohibuit.* militi defensionem esse licitam <sup>a</sup>: alioqui  
*C. de iur. fisc.* verò non erit resistendum <sup>b</sup>. nam omnis  
*bb. 10.* contumacia aduersus ducem vel præsi-  
*b c. qui resi-* dem, capitalis est <sup>c</sup>. Neque solùm capita-  
*stit. 2. qu. 3.* lis pœna statuta est in eos, qui manus in-  
*c l. omne. §.* tulerunt præposito <sup>d</sup>: sed etiam in eos,  
*contumacia.* qui eum defendere noluerunt <sup>e</sup>, vel de-  
*D. de re milit.* seruerunt, occidique passi sunt <sup>e</sup>. idemq;  
*d l. omne. §. 1* regia Hispaniarum lege constitutum est  
*D. de re milit.* in eos, qui regem suum deseruerunt <sup>f</sup>.  
*e l. 2. in fin.* Senatus autem Romanorum quàm gra-  
*Et d. l. omne.* uissimè tulit, quòd Q. Petilium consulè  
*in fin. D. de re* fortissimè aduersus Ligures pugnâtem,  
*mo st.* occidi milites passi essent, & legionem ne-  
*f Reg. l. 3. tit.* que stipendium anni procedere, neque  
*19. par. 2.* æra dari voluit: quia pro salute impera-  
*g Val. Max.* toris hostium telis se non obtulissent &. *lib. 2. cap. 7.*  
 Celtiberi verò nefas esse duxerunt prælio  
*h Val. Max.* superesse, cùm is occidisset, pro cuius sa-  
*lib. 2. cap. 6.* lute spiritum deuouissent <sup>h</sup>. Cuius con-  
 ditionis homines fuisse apud Gallos,  
*i de bel. gal.* quos illi Soldurios appellabant, refert  
*lib. 3.* Cæsari. Porrò vsque adeo seuerè imperio  
 ducis pareri, eiusque edicta obseruari  
*k l. 3. §. in* præcipitur, vt capitis pœnam subeat, qui  
*bello. D. de re* rem a duce prohibitam fecerit <sup>i</sup>, aut mãm-  
*mo st.* data eius nõ seruauerit, etiam si res bene  
 cesserit <sup>k</sup>. Cuius disciplinæ seuerissimi  
 custodes

custodes fuere Postumius, Tubertus & Manlius Torquatus: quorum alter filiū, quia non suo iussu, sed sponte, præsidio progressus hostes fuderat, victorē securi feriri iussit. alter verò, cui Imperioso postea cognomen fuit, filium, quòd prouocatus a Geminio Metio duce Tusculanorum, ad dimicandum contra edictum patris descenderat, gloriosam victoriam, & speciosa spolia referentē, in conspectu exercitus virgis cæsum securi percussit. & Manlius filius exercitu pro se aduersus patrem seditionem parante, negauit tãti esse quemquam, vt propter illum disciplina corrūperetur, & obtinuit vt ipsum puniri pateretur<sup>a</sup>. Vnde Paulus ait, disciplina castrorū antiquiorem Romanis<sup>\*</sup> fuisse, quàm charitatem liberorum<sup>b</sup>. Nec minori seueritate Papyrius dictator Q. Fabium magistrum equitum, quòd cōtra eius imperium exercitum eduxisset: quãquam fuis Samnitibus in castra redierat, neque virtute eius, neque successu, neque nobilitate motus, nudatum, virgisq; cæsum securi percussurus, apulo Rom. tribunisq; plebis, qui pro eo intercedebant, constanter poposcit<sup>c</sup>. Perinde autē in eum militaris animad-

<sup>a</sup> *Linium l. 7*  
*et 8. Valer.*  
*Max. l. 2. c. 7.*  
*Gell. l. 9. c. 13*  
<sup>b</sup> *in l. postli-*  
*minum. §. si-*  
*lius quoque.*  
*D. de capti. et*  
*postli. reuers.*

<sup>c</sup> *Linium lib. 8*  
*Val. Max. lib.*  
*2. cap. 7.*

## DE IVRE ET OFF. BELL.

uersio fuit, qui extra ordinem etiam in prouocantem, cōtra imperium pugnas-  
set, aut classico reuocatus, tardius paruif-  
set, quàm si ciuem aut socium iniuria af-  
fecisset. Itaque Cyrus laudasse dicitur  
militem, qui cūm hostem interfecturus  
gladium eduxisset, classico receptui au-  
dito ictus cohibuit, hostemque dimisit.

## DE EMANSORIBVS.

- 1 *Sine commeatu miles a signis abesse non potest.*
- 2 *Qui agmen excessit fustibus caditur.*
- 3 *Emansor quis, & quomodo puniatur.*
- 4 *Qui vallum transcendit.*
- 5 *Qui ad commeatus diem non redit.*

## CAPVT XI.

**I**Vre militari apud Romanos cautum fuit, ne miles sine commeatu\* ab signis abeat, neue prælio decedat, neue locum relinquat, aut e castris fugiat, neue decedat longius, sed explorato, & sub signis atque subsidiis positus, non modo in acie procedat, sed & lignatum aut populatū vadat, omnia denique, veluti si coram hoste cauta præuisaque essent. qui verò longius a tubæ auditu, nisi imperatoris aut tribuni iussu, extra munimenta abiif-  
set, in

set, in eum militaris animaduersio erat: ne scilicet vagi milites solutiore cura obambulantes, in hostili loco temerè progressi cædibus essent & periculis obnoxij: tum etiam vt a rapina contineretur:

2 vnde qui agmen excessisset\*, ex causa vel fustibus cædebatur, vel mutare militiam solet<sup>a</sup>. Lyfander Lacedæmonius egres-  
sum via quendam castigabat, cui dicenti ad nullius rei rapinam se ab agmine excessisse, respondit: Ne speciem quidem rapturi præbeas volo. Alexander Seuerus, si quis de via in alicuius possessione deflexisset, eum fustibus cædi iubebat, & dum castigaretur, per præconem proclamari & edici: Quod tibi fieri non vis, alteri ne feceris. quod a Christianis aliquando audiuerat. Pompeius verò missus in Siciliam legatus, cùm audiret milites in itinere faciundo sæpe euagari, vimque hominibus facere, & prædas auertere, eos qui temerè oberrabant, supplicii compescuit: a se autem missorum gladiis sigilla imposuit<sup>b</sup>. Porrò qui diu vagatus sine cõmeatu ad castra regreditur, eman-  
3 for\* dicitur: cuius crimè leuius est, quàm desertoris<sup>c</sup>: vt erronis leuius est in seruo, quàm fugitiui<sup>d</sup>. Examinantur autem

<sup>a</sup> l. 3. §. sed qui. D. de re milis.

<sup>b</sup> Plus. in a-  
poph.  
<sup>c</sup> l. 3. §. emã-  
sionis. D. de ra-  
milis.  
<sup>d</sup> l. fugitiuus  
D. de verbor.  
sign.

DE IVRE ET OFF. BELL.

causæ emanationis, & cur, & vbi fuerit, & quid egerit, & datur venia valetudini, affectioni parentum & affinium, & si seruum fugientem persecutus est, vel si qua huiusmodi causa sit: sed & ignoranti adhuc disciplinam tyroni ignoscitur<sup>a</sup>. Hostibus tamen imminentibus, qui in exploratione emanet, aut a fossato recedit, capite punitur<sup>b</sup>. similiter & is qui vallum transcendit\*, aut per murum castra ingreditur<sup>c</sup>. muri enim sacrosancti semper habiti fuerunt<sup>d</sup>. Is quoque qui comteatu\* g<sup>o</sup> accepto ad diem comteatus non rediit, perinde in eum statuendum Modestinus respondit, ac si emanfisset, vel deseruisset pro numero temporis: facta prius copia dicendi, num fortè casibus quibusdam detentus esset, propter quos venia dignus videatur<sup>e</sup>. Vsq; adeo verò odiosum fuit a signis abesse, vt miles qui in comteatu agit, non videatur reipub. causa abesse, vt Vlpianus respondit<sup>f</sup>: si puta vagentur, aut domi suæ ocietur, vt Iabolenus sensit<sup>g</sup>. nam vt Vlpianus ait<sup>h</sup>: Ij tantum reipub. causa abesse intelliguntur, qui non sui commodi causa, sed coacti absunt. at comteatum quãparcissimè dari debere militibus, alio loco diximus.<sup>i</sup>

a l. qui cum. in fin. D. de re milit.

b l. 3. §. is qui. D. de re milit.

c l. 3. §. in bello. D. de re milit.

d §. sanctè. inst. de rer. diuis.

e l. 3. §. si ad diem. l. qui comteatus. D. de re milit.

f in l. 1. D. de re milit.

g in l. miles. D. ex quibus caus. maio.

h in l. reipub. D. ex quibus caus. maio.

i 3. de offic. tribuni.

DE DE-

- 1 *Desertor quis & quomodo punitur.*
- 2 *Qui desertorem occulant.*
- 3 *Desertor restitutus non accipit stipendia temporis quo in desertione fuit.*
- 4 *Qui filium militia subtrahit.*

CAPVT XII.

1 **D**esertor\* in iure dicitur, qui per longum tempus vagatus reducitur a. a l. desertorē. §. desertor. D. de re milit. Semel autem militiæ ascriptus, nisi debitè missus, eam deserere non poterat: quod grauissimum crimē habitum fuit. non tamen omnes desertores similiter puniendi sunt. nam habetur ordinis, & stipendiorum ratio, & anteastræ vitæ. refert etiam num solus, vel cum pluribus, semel, aut iterū quis deseruerit. aliudue crimen desertioni adiunxerit. item temporis ratio habetur. nam qui in pace deseruit, eques gradu pellēdus est, & pedes b l. nō omnes. D de re milit. militiam mutat. in bello idē admissum, capitale est<sup>b</sup>. Grauius quoque in eo statutum fuit, qui post desertionem in aliā c l. qui cum uno. §. qui post. D. de re milit. militiam se dedit, legiue passus sit<sup>c</sup>. Imperatores verò permiserunt cuiuslibet desertorem opprimere<sup>d</sup>. quod Leo imperator ita restrinxit, si inuentus restiterit<sup>e</sup>. d in l. ult. C. quād. lic. vn. sine iud. e l. 2. C. de desert. lib. 12.

DE IVRE ET OFF. BELL.

Defunctorum autem in desertione bona publicantur<sup>a</sup>. Neque solum ipsi desertores puniendi sunt, sed etiam ij qui eos occultant\*. item iudex, qui gratia, 2 vel dissimulatione poenam desertori irrogare neglexit<sup>b</sup>. qui vero desertorem prodit, praemio afficitur<sup>c</sup>. desertori tamen qui se obrulit, indulgeri solet<sup>d</sup>. nisi forte quis post quinquennium se obtulerit, qui deportari iubetur<sup>e</sup>. Et quamvis desertor\* ex indulgentia fuerit restitutus, 3 non tamen stipendia eius temporis, quo in desertione fuerit, exigere poterit<sup>f</sup>. Non minus graviter quam in desertore, statutum est in eum, qui filium suum militiae subtraxisset\*. nam si id belli tempore 4 fecisset, exilio & parte bonorum multabatur: si in pace, fustibus caedi iuebatur, & requisitus iuuenis in deteriolem militiam dabatur. & qui filium debilitavit defectu indicto, ut inhabilis militiae esset, deportari ex rescripto D. Traiani solet<sup>g</sup>. Caesar autem cum conveniret, in ceteris seditiosorum & desertorum acerrimus inquisitor & punitor dicitur fuisse maximus. & Aufidium Cassium memoriae proditum est, nouo exemplo multis desertoribus manus detruncasse & pedes, asferens

*a l. defunctorum. C. de re mil. lib. 12.*

*b l. 1. C. de deserto. lib. 12*

*c d. l. 1.*

*d l. non omnes.*

*§. qui in desertione. l. qui*

*cum vno. §.*

*edictum. D.*

*de re mil.*

*e l. milites agrum. in fin.*

*D. de re mil.*

*f l. cum allega-*

*tiis. C. de re*

*milit. lib. 12.*

*l. penult. D. de*

*re milis.*

*g l. qui cum*

*vno. §. filium.*

*D. de re mil.*

ferens maiori disciplinæ fore miserabiliter criminofum viuere, quàm occidere.

DE TRANSFVGIS ET PRODI-  
TORIBVS.

- 1 *In transfugas acerrimè animaduersum.*
- 2 *Qui cum potest redire, & non redit, pro transfuga habetur.*
- 3 *Exploratores quomodo puniendi.*
- 4 *Arcana consilia non sunt euulganda.*
- 5 *Speculatores hostium.*
- 6 *An sit nobili viro dignum speculatorem esse.*
- 7 *Minimè tutum per fugis credere.*

CAPVT XIII.

**I**N transfugas\*, velut maiore crimine  
obnoxios, & patriæ acciuium prodito-  
tores, acerrimè semper animaduersum  
fuit, & venia indigni fuere. nam vt Pau-  
lus ait: Transfuga, qui malo consilio &  
proditoris animo patriam reliquit, ho-  
stium numero habendus est, & capite  
punitur<sup>b</sup>. & vbicunq; inuentus, quasi  
hostis interfici potest<sup>c</sup>: ac legis Iulij ma-  
iestatis reus est<sup>d</sup>. torqueri quoque, & ad  
bestias, vel in furcam cõdemnari potest,  
quamuis milites nihil eorum patiatur<sup>e</sup>.

a in l. postli-  
mentum. §.  
transfuge. D.  
de capt. &  
postl. reuers.

b l. prodito-  
res. D. de ro-  
milit.

c l. 3. §. ult.  
D. ad l. Corn.  
de fica.

d l. 2. D. ad  
l. Iul. ma.

e l. 3 §. is qui  
D. de remilit.

c 5 Is etiam,

DE IVRE ET OFF. BELL.

—Is etiam, qui volens transfugere depre-  
 a *l. defertorē.* hensus est, capite punitur<sup>a</sup>. Itaque Ful-  
 §. *is qui ad* uium senatoris filium ad Catilinam pro-  
*hostes. D. de* ficiscētem retractum ex itinere iussit pa-  
*re milit.* rens necari<sup>b</sup>. P. autem Scipio Africanus,  
 b *Sallust. in* alioquin mitissimi ingenij, in perfugas  
*conuraz. Ca-* & fugitiuos acerbus fuit: si quidē deuicta  
*til.* Carthagine ad firmandam disciplinam  
 militarem, ex Romanis, qui rupto impe-  
 rio ad hostes transfugerant, in crucem  
 c *Liv. lib. 30.* efferrī, nominis verò Latini securi per-  
*Val. Max. l. 2* cuti iussit<sup>c</sup>. & posterior Africanus transfu-  
*cap. 7.* gas bestiis obiecit<sup>d</sup>, Paulus Æmilius  
 d *Val. Max.* elephantis. M. Marcellus Leontinis ca-  
*lib. 2. cap. 7.* ptis, ad duo millia transfugarum securi  
 e *Liv. lib. 24* percussit<sup>e</sup>. Metium verò Suffetium pro-  
 f *Liv. lib. 2.* ditionis reū, quadrigis in diuersum actis  
 discerptum fuisse legimus<sup>f</sup>. Et cccclxx.  
 perfugæ, qui ad Annibalem transfuge-  
 rant, recepti a Q. Fabio Romam missi,  
 g *Liv. lib. 24* virgis in comitio cæsi omnes, ac de saxo  
 deiecti sunt<sup>g</sup>. Idem tamē Fabius Maxim.  
 mitius agens, illorum qui contra reli-  
 gionem iurisiurandi transfugerant, dex-  
 tras amputari mandauit: vt trunca præ  
 se brachia gestantes, defectionis metum  
 h *Val. Max.* reliquis inijcerent, & ceteris, ne idem  
*lib. 2. cap. 7.* cōmittere auderent, documēto essent<sup>h</sup>.  
 Apud

Apud Athenienses verò proditionis reū sepelire nefas fuit. eumque cum tota posteritate inter infames referebant: & cadavera eorum extra fines patriæ deportari iusserunt<sup>b</sup>. ei tamen, qui transfugit, & postea multos hostes apprehendit, & transfugas demonstraerit, posse parci D. Hadrianus rescripsit<sup>c</sup>. Habetur etiam

2 pro transfuga is, qui cūm posset \* redire, non rediit<sup>d</sup>. Et quidem ab hostibus remissi milites, non aliter restituendi sunt, quàm si constiterit eos captos fuisse, nō

3 transfugisse<sup>e</sup>. Porrò exploratores\*, qui secreta hostibus nunciant, proditorum loco habentur, & capitis pœnas luunt<sup>f</sup>: & viui exuri, aut furca suspendi solent<sup>g</sup>.

Apud Carthaginenses verò quodā potentissimo ea tempestate Pœnorū proditionis damnato, quòd odio Hannonis ducis belli Græcis litteris Dionysio tyranno aduentum exercitus, & segnitiam ducis prænucciaisset, S. C. factum est, ne quis postea Carthaginensis aut Græcis litteris, aut Græco sermoni studeret: ne aut loqui cum hoste, aut scribere sine interprete posset<sup>h</sup>. Neque solūm pœna digni fuerunt, qui hostibus secreta nunciarent: sed etiam ij, qui apud suos ea euulgarent.

a Plut. in vita  
ta dec. Rhod.  
b Plut. de sera  
ra inuis. vna.  
c l. nō omnes.  
in fin. D. de  
re milit.

d l. non omnes.  
§. qui captus.  
D. de re mil.

e l. nō omnes.  
§. a barbaris.  
cū §. seq. D.  
de re milit.

f l. omnes. §.  
exploratores.  
D. de re milit.

g l. si quis a  
liquid ex me-  
tallo. §. irāf-  
fuge. l. aut  
damnum §.  
hostes. D. de  
pœnis.

h Iustin. l. 20

DE IVRE ET OFF. BELL.

garent\*. Itaque apud Ægyptios legem- 4  
 litari cautum fuit, vt qui ducis cōsilium  
 palam fecisset, lingua multaretur<sup>a</sup>. Perse  
 verò veteri eorum disciplina arcana regū  
 vitę periculo custodiri sanxerūt<sup>b</sup>. Et me-  
 moriæ proditum est, multis seculis P.  
 conscriptorum arcana consilia a nemine  
 senatorum fuisse euulgata. Itaque Q. Fa-  
 bius Max. quòd de bello Punico indicē-  
 do, de quo secreto in curia actum erat, P.  
 Crasso narrauit, quamuis per imprudē-  
 tiam, memor eum triennio ante quęsto-  
 rem factum, ignarusque nondum a cen-  
 soribus in ordinem senatorum allectum,  
 vehementer a cōsulibus obiurgatus fuit.  
<sup>c</sup> lib. 2. c. 2. Nunquam enim, vt ait Val. Max<sup>c</sup>. taci-  
 turnitatem, optimum ac tutissimum re-  
 rum administrandarum vinculum, labe-  
 factari volebant. Sicque cū Asiæ rex  
 Eumenes amantissimus Romanorū bel-  
 lum a Perse aduersus populum Roman.  
 comparari senatui nunciaffet, non ante  
 sciri potuit, quid aut ille locutus esset,  
 aut patres respondissent, quàm Perse  
 captum cognitum esset<sup>d</sup>. Prudēter verò  
 Cęcilius Metellus tribuno militum per-  
 cunctanti quid esset facturus: Si eius, in-  
 quit, rei scirem mihi tunicam consciam,  
 exutam

<sup>a</sup> Diad. Sicul.  
lib. 2.

<sup>b</sup> Q. Curt.  
lib. 4.

<sup>d</sup> Val. Max.  
lib. 2. cap. 2.

exutam in ignem conijcerem. indicans ducū consilia non esse euulganda. Porro proditoribus annumerari possunt, qui ad hostes tela armæue deferunt: quod capitale est, bonis eorum publicatis<sup>a</sup>. Et

Paulus respondit, ferrum hostibus vendare sine capitis periculo nō licere<sup>b</sup>.

qui verò operam dabant, vt barbari Romanos deprædarentur, & prædam cum hostibus diuidebant, viui exuri solent<sup>c</sup>.

5 Ceterum hostiū speculatores<sup>\*</sup> apud nos forte deprehensos, non tanto odio dignos esse, quanto ij qui ad hostes transfugiunt, & secreta hostibus nunciant, ratio ipsa satis indicat, quippe qui nulla perfidia notantur. Vnde speculator quidam Carthaginienfis, qui per biennium fefellerat, Romæ deprehensus, præcis tantum manibus dimissus est<sup>d</sup>.

6 quæri, an sit nobili viro dignum<sup>\*</sup> speculatore esse, & explorare hostium consilia & facta. Et certè ex professo hanc artem exercere mercedis gratia, nō puto viro nobili honori esse, neq; citra ignominia notam licere: vt colligere licet ex iis quæ de nobilibus latè tradit Tiraquelus. Si quis verò amore reipub. & pro salute communi & publica hoc faciat, non solum

<sup>a</sup> l. i. C. quæ res expor. non deb. l. 4. D. ad l. iul. ma.  
<sup>b</sup> l. cotem. D. de public.

<sup>c</sup> l. i. qui. C. de re mil. l. 12

<sup>d</sup> Liv. lib. 22

DE IVRE ET OFF. BELL.

solùm nõ indignum viro nobili, sed etiã maximè gloriosum iudico. nam & Dominus præcepit Moyse proficiscenti cum Israëlitis in terram promissionis, vt præmitteret singulos de singulis tribubus ex præcipuis in terram Chanaã, qui considerarent, qualis quantaque esset, & vtrum fortis populus, an infirmus, pauci numero, an plures, ipsa terra bona, an mala, vrbes munitæ, nec ne, ceteraque omnia explorarent <sup>a</sup>. Et Iosue duos exploratores misit in urbem Iericho, antequam eam oppugnaret <sup>b</sup>. Itaq; Sex. Tarquinius, simulata patris sæuitia & odio Gabios profugit: quo astu dux ab illis electus, vno aut altero prælio prosperè regesta, cum vniuersa res Gabina illi credita esset, sublatis de medio primoribus ciuitatis, sine certamine oppidum patri, qui illud oppugnabat, in manus tradidit <sup>c</sup>. Et Zopyrus homo nobilis, Darij Persarum regis amicus, cum videret regē longa obsidione Babylonis defessum, & difficilem admodū expugnationem fore, truncatis sibi ipsi naso & auribus, lacero corpore ad Babylonios transfugit, simulās se a Dario tam foedè cæsum. quare credita benignè ab hostibus exceptus,

turmis

<sup>a</sup> Num. 13.

<sup>b</sup> Iosu. cap. 2.

<sup>c</sup> Liv. lib. 2.

turmisequitum præfectus, vno aut altero prælio re bene gesta, tandè dux totius exercitus constitutus, urbem atque exercitum Dario tradidit <sup>a</sup>. Araspa quoque <sup>a</sup> *Iustio. lib. 1*  
nobilissimus Medus, ex Cyri comitibus, iussu eius ad Assirium regem transfugit, & exploratis hostium copiis & consiliis ad Cyrum reuersus, in publica concione ab eo laudatus est <sup>b</sup>. Quibus etiam exemplis docemur, quam minimè tutum sit <sup>b</sup> *Xeno. in ped. Cyri l. 6*  
7 perfugis credere\*, quibus certè, etiam si sine dolo & fraude ad nos profugiant, & suos prodant, non multum fidei habendum erit. quomodo enim sperari potest in alienos fidũ fore, qui in suos perfidus existit? Itaque Antigonus dicere solet, se proditores amare dũ proderet, vbi verò prodidissent, eos omni odio persequi. quò spectat Augusti dictum: Proditionem amo, proditorem non laudo <sup>c</sup>. Et <sup>c</sup> *Plut. in a. poph.*  
facetè Philippus Macedo, quãquam decepto hoste semper gauderet, conquærenti cuidam, quòd milites eum proditorem vocarent, eo quòd patriam Philippo prodidisset: Noli mirari, inquit, hebetes enim ingenio sunt Macedones, & agrestes admodum, vtpote qui scaphã scapham vocant: his verbis docens, proditores

DE IVRE ET OFF. BELL.

ditores omnibus ludibrio esse debere: Romanis certè veteribus illis, insitum fuit Romanis, vt ipsi dicebant, artibus, id est, virtute, opere, armis potius vincere, quàm aliena iniquitate, vt alio loco ostendimus.<sup>a</sup>

<sup>a</sup> 7. de infid.  
& fraud. ho-  
stis.

DE SEDITIOSIS.

- 1 *Intestinae seditiones perniciosae.*
- 2 *In seditiosos acriter animaduersum.*
- 3 *Non temerè experiendum imperium.*
- 4 *Luxus & licentia maxime fouent seditiones.*
- 5 *Seditio mira dexteritate sedata.*
- 6 *Aliter in bello, aliter in pace agendum.*
- 7 *Prius lenienda seditio, quàm in auctores animaduertatur.*
- 8 *Quomodo compefcatur seditio.*

CAPVT XIII.

QVàm perniciosæ sint\* intestinae dis-  
sentiones, disertè Menenius Agrip-  
pa orator, ad populum, qui in sacrum  
mòtem secesserat, apologo suo de mem-  
brorum humani corporis dissentione,  
ostendit <sup>b</sup>: & Scylurus fasce suo hastarū,  
quem filiis suis, quos octoginta habebat,  
confringendum exhibuit. Etenim haud  
pauciores exercitus discordia & seditio-  
ne, pro-

<sup>b</sup> *Limus* 1,2

ne, propriis viribus consumptos, quàm ab hostibus prostratos fuisse satis cōstat.

2 Vnde in seditiosos\*, & seditionū auctores acriter semper sæuitum est, tanquam in criminis læsæ maiestatis reos<sup>a</sup>. itaque capite puniri Modestinus respōdit eum,

*a l. 1. D. ad l. l. l. v. auct.*

qui atrocem militum seditionem concitavit: sin verò intra vociferationem & leuem querelam seditio mota esset, gradu militiæ deijci<sup>b</sup>. & Paulus seditiosos, pro qualitate dignitatis, in furcam tolli, aut bestiis subijci, aut in insulam deportari voluit<sup>c</sup>. Ex cōstitutionibus quoque regni Hispaniæ, pro qualitate delicti, & personæ, puniri iubetur. & siquidem eo animo seditionem mouerint, vt impeditur occasio rei benegerendæ, erutis oculis in carcerem conijciuntur, donec occasio rei gerendę transferat: & quidem si sint ex dignioribus, captiui constituuntur, & postea in exilium mittuntur<sup>d</sup>.

*b l. 3. in fin. D. de remilit.*

*c in l. si quis aliquid ex metallo. §. auctores. D. de pen l. 1. et 2. C. de seditiono.*

Cæsar autem cū in ceteris criminibus commueret, in seditiosos acerrimus vindex fuit, & ex causa seditionis, in tumultu ciuiliū armorum, ac tum maximè tumentibus animis, legionem totam exauctorauit, auctoribus seditionis securi percussis: sed mox eos quos exauctora-

*d Reg. lib. 4. c. 5. tit. 28. per. 2.*

d uerat,

DE IVRE ET OFF. BELL.

uerat, ignominiam deprecâtes restituit,  
& optimos milites habuit. Cn. Põpeius  
minitantibus direpturos pecuniam mi-  
litibus, quæ in triumpho ferebatur, Ser-  
uilio & Glaucia hortâtibus, vt diuideret  
eam, ne seditio fieret, affirmavit non  
triumphaturum se, sed potius moriturû,  
quàm licentię militum succumberet, ca-  
stigatisq; oratione graui militibus, lau-  
reatos falces obiecit, vt ab illorum inci-  
perent direptione, eaq; muidia rededit  
eos ad modestiam. Monendi tamen sunt  
duces belli, ne temere experiantur im-  
perium<sup>a</sup>, cuius vis omnis in consensu o-  
bedientium est, si forte periculum sit, nõ  
fore dicto audientes milites: vt prudẽter  
legati App. Claudium monuerunt, sæ-  
uire volentem in milites, qui odio eius  
in aciem producti, turpi fuga petierant  
castra<sup>a</sup>. Porrò Gemitius consul millia  
hominum quattuor exauctorauit, & in  
foro percussit, quòd licentia corrupti  
Rhegium, in cuius præsidio erant, occu-  
pauerant, & eorum corpora sepulturæ  
mandari, mortemque lugere veruit<sup>b</sup>.  
Atquẽ in compescendis cohibendisq;ue  
militum seditionibus magna requiritur  
ducis prudẽtia, qui in primis scire debet,  
luxum

<sup>a</sup> Liv. lib. 2.

<sup>b</sup> Val. Max.  
lib. 2. cap. 7.  
Liv. lib. 28.

4 luxum & licentiam<sup>\*</sup> ex ocio, vt fit, colle-  
 etiam maximè fouere istiusmodi militū  
 consilia: vt Liuius in sua historia satis o-  
 ,, stendit<sup>a</sup>, cū ait: Iam tum minimè salu- a lib.7.  
 ,, bris militari disciplinæ Capua, instru-  
 ,, mento omnium voluptatum delinitos  
 ,, militū animos auertit a memoria patriæ,  
 ,, inibanturque consilia in Hibernis, eodē  
 ,, scelere adimendę Campanis Capuæ, per  
 ,, quod illi eam antiquis cultoribus ade-  
 ,, missent. Ceterum in hac coniuratione  
 Capuana compescenda, laudanda pru-  
 5 dentia C. Martij Rutilij cons.<sup>\*</sup> qui & æ-  
 tate, & vsu doctus, optimum ratus diffe-  
 rendo spem, quodocunque vellent, cō-  
 silium exequendi militarem impetū fru-  
 strari, rumorē dissipat in iisdem oppidis  
 & anno post præsidia hibernatura, diuisa  
 enim erant per Campaniæ vrbes. eoque  
 laxamento cogitationibus dato, quieuit  
 in præsentia seditio: & consul educto in  
 æstiuam militem, dum quietos Samnites ha-  
 bebat, exercitū purgare missionibus tur-  
 bulētorum hominum, mira dexteritate  
 instituit, alios aliis ex causis<sup>b</sup>. Neque e- b Liuii l.7.  
 nim semper conuenit imperiū experiri.  
 sæpe enim, vt Tacitus ait, quod in pacis  
 ocio vindex disciplina persequitur; inter  
 d 2                    gladios

DE IVRE ET OFF. BELL.

gladios & turbas cauta toleratur patientia. & vt Fabius Max. dicebat, aliter in medio ardore \* belli ; aliter in pace tranquilla arbitrādum & agendum esse, vt a-  
libi ostendimus<sup>a</sup>. Hinc quoque graui aliqua seditione exorta, eandem, quacunque ratione, leniendam\*, & tum demum  
in auctores animaduertendum censeo, ne alioqui magis irritetur & accendatur, quàm sedetur aut extingatur militaris furor : exemplo Scipionis, qui in castris ad Sucronē in Hispania seditione orta, inter suos milites septē tribunos ad eos misit, qui placido sermone permulcētes lenirent militum animos, & edicto proposito, vt ad stipendium petendum conuenirēt, Carthaginem pertraxit: vbi circumfuso omni exercitu graui oratione castigatis militibus, metu torpentibus, auctores seditionis in mediū protractos, nudos deligatos ad palum virgis cæsos securi percussit: cumque certatum fuisset sententiis, vtrum in auctores tantum seditionis animaduertetur, an plurium supplicio vindicanda tam foedi exempli defectio magis, quàm seditio esset: vicit sententia lenior, vt vnde orta culpa esset, ibi poena consisteret<sup>b</sup>. his adde quod  
Tacitus

<sup>a</sup> 7. Temporis  
rationem ha-  
bendā, lib. 2.

<sup>b</sup> *Lin. lib. 28.*

Tacitus ait <sup>a</sup>, saluberrimum esse ad con- a *annal. lib. 1*  
 tinendam militarem fidem, vbi seditio  
 8 timetur <sup>\*</sup>, vt longis spatiis distineatur e-  
 exercitus, ne viribus & vitiis milites mis-  
 ceantur. sed & cùm ocium militarem se-  
 ditionem maximè foueat, illud bello, A-  
 lexandri exemplo, interpellare cōuenit.  
 Prudenter verò Cæsar bello ciuili, vt sibi  
 exercitum deuinciret, a tribunis militū,  
 centurionibusq; mutuas pecunias sum-  
 psit, quas exercitui distribuit. quo facto  
 duas res consecutus est, quia pignore a-  
 nimos centurionum deuinxit, & largi-  
 tione redemit militum voluntates <sup>b</sup>. Est b *Cæsar de  
bel. ciuili. lib. 1*  
 autem memorabile, quod de Annibale  
 tradunt historiæ: quippe qui cùm in ho-  
 stiū terra per annos tredecim, tam pro-  
 cula domo, varia fortuna bellū gereret,  
 exercitu non suo ciuili, sed misto ex col-  
 luuione omnium gentium, quibus non  
 lex, non mos, non lingua communis; a-  
 lius habitus, alia vestis, alia arma, alij ri-  
 tus, alia sacra, alij prope dij essent, ita  
 quodam vno vinculo copulauerit eos,  
 vt nulla nec inter ipsos, nec aduersus du-  
 cem seditio existeret, cùm & pecunia sæ-  
 pe, & stipendium, & commeatus in ho-  
 stium agro deesset <sup>c</sup>. Idem de Viriato le- c *lin. lib. 27*  
 d 3                    gimus,

DE IVRE ET OFF. BELL.

gimus, qui per octo perpetuos annos, quibus bellū cum Romanis gessit, exercitum ex omni hominum genere conflatum, sine seditione obsequentissimum habuit<sup>a</sup>. quod certè non sine admiranda quadam virtute ducis fieri potuit. Scipio verò alioqui summus imperator, nimia lenitate sua militibus ansam ad seditionē præbuit. quo nomine Q. Fabius Max. eū ad corrupendam disciplinam militarem natum arguebat, & plus prope in Hispania culpa Scipionis per seditionem militum, quàm bello amissum esse. Adeo natura insitum quibusdam est, vt magis peccari nolint, quàm satis animi ad vindicanda peccata habeant.

<sup>a</sup> Appian. de  
bel. hisp.

DE IIS QVI IN ACIE LOCO CEDVNT, AVT VICTI SE DEDVNT.

- 1 *Imperator magis quàm hostis timendus.*
- 2 *Qui in acie prior fugit, capite punitur.*
- 3 *Seueritas ad rem bene gerendam prodest.*
- 4 *Qui se hostibus dedunt, car èt postliminio.*
- 5 *Qui metu hostium languorem simulat.*

CAPVT XV.

**C**learchus Lacedæmoniorum dux exercitui dicere est solitus, imperatorem

1 **to**rem potius \* quàm hostem metui debere, significās eos, qui in prælio dubiam mortem timuissent, certum, si deseruissent, manere supplicium: vt scilicet institutum esset militibus, aut vincendum, aut moriendum esse. Quæ certe necessitas in virtutem verti solet. de quo alio loco diximus <sup>a</sup>. Vnde iure militari cautum est,

2 vt qui in acie prior fugam fecerit \*, capite puuiatur <sup>b</sup>. Idem in nobili fugiēte, regia Hispaniæ lege statutum est <sup>c</sup>: at iure canonico fit infamis <sup>d</sup>. lege verò diuina timidi iubebantur reuerti in domum suā, ne aliis timorem incuterēt <sup>e</sup>. App. Claudius ex his, qui bello Volscō loco cesserant, decimum quemque sorte ductum ad suppliciū legit <sup>f</sup>. idem fecit Antonius bello Parthico. P. Cornelio Nasica, Decimo Iunio cons. qui exercitum deseruerant, damnati virgis cæsi, publicè vānierūt. Attilius regulus cū ex Samnio in lucernam transgrederetur, exercitusque eius obuiis hostibus aduersus esset, opposita cohorte iussit fugiētes pro defectoribus cædi. Camillus dictator Veiēti bello dictus omnium primum, in eos, qui a Veiis proximo prælio pauore fugerant, more militari animaduertit, effe-

d 4      citque

<sup>a</sup> 5. necessitatem pugnandi. lib. 2.

<sup>b</sup> l'omme. 5. qui prior D. de re milit.

<sup>c</sup> Reg. l'ult.

<sup>d</sup> tit. 21. par. 2.

<sup>e</sup> c infamis.

<sup>f</sup> 6. quest. 1.

<sup>g</sup> Dent c. 20

<sup>h</sup> Ludub c. 7

<sup>i</sup> L'uius l. 3.

<sup>j</sup> Appian. de bello Part.

DE IVRE ET OFF. BELL.

citque ne hostis maximè timèdus militi  
<sup>a</sup> *Liv. lib. 5.* esset<sup>a</sup>. T. Scaurus filium, quòd in saltu  
Tridentino hostibus cesserat, in conspe-  
ctum suum venire vetuit: quare adoles-  
cens verecūdia ignominiaē pressus, mor-  
tem sibi cōsciuit. Marcellus verò mitius  
agens, milites a quibus orta fuga esset,  
qui que pauore signa reliquissent, sequē-  
ti pugna inter primas acies frequentes  
induxit, vt quod ignominiaē acceperant,  
<sup>b</sup> *Val. Max. lib. 2. cap. 7.* aliis prēliis periculo expiarent<sup>b</sup>. Senatus  
autem Romanus eos, qui commilitones  
suos pugnantes apud Cannas deserue-  
rant, graui decreto vltra mortuorum  
cōditionem in Siciliam relegauit, & ac-  
ceptis a Marcello litteris, vt eorū opera  
ad expugnationem Syracusarum vti li-  
ceret, rescripsit indignos esse, qui in ca-  
stra reciperentur, nec reipubl. iis com-  
mittēdam esse: ceterum se ei permittere,  
vt faceret quod reipubl. expedire iudica-  
ret: dum ne quis ex eis munere vacaret,  
aut dono militiaē donaretur, aut in Ita-  
liam, donec hostes in ea essent, accede-  
<sup>c</sup> *Liv. l. 25. Val. Max. l. 2. rap. 7.* ret<sup>c</sup>. idem decretum fuit in eos, qui de  
exercitu Cn. Fuluij prætoris in Apulia  
fœde cæsi, fugati que supererant: addi-  
tum que ignominiaē, ne in oppidis hiber-  
narent,

narent, néue hiberna propius vllam vr-  
 bem decé millibus passuum ædificarent.  
 & Cn. Fulvius capitis accusatus, in exi-  
 lium abiit<sup>a</sup>. Scipio tamen cùm in Africã <sup>a Livius l.26</sup>  
 transfret, non est aspernatus milites, qui  
 ex Cannensi clade supererant, vt qui ne-  
 que ad Cannas ignavia eorum cladé ac-  
 ceptam sciret, sed culpa ducis, neq; vllos  
 æquè veteres milites in exercitu Roma-  
 no esse, expertosque non variis præliis  
 modò, sed in vrbibus etiam oppugnan-  
 dis<sup>b</sup>. Porrò quantum huius disciplinæ <sup>b Livius l.29</sup>  
 feueritas ad rem bene gerendam profe-  
 cerit<sup>\*</sup>, multis exemplis docemur. itaque  
 3 Licinius Crassus contra Spartacum gla-  
 diatorem (qui cum magna manu fugiti-  
 uorum & suæ cõditionis hominum Ro-  
 manis bellũ inferebat) aliquot victoriis  
 ferocè profectus, legionibus decimatis,  
 quòd male pugnassent, effecit, vt magis  
 ipse, quàm hostis timeretur: & denuò in  
 aciem suis productis, quamuis hac deci-  
 matione multum imminuto exercitu,  
 magna strage hostiũ facta, egregiè Spar-  
 tacum vicit<sup>c</sup>. Similiter L. Apronius, suis <sup>c Appian. de  
 bel. civil. l. 1.  
 in fine.</sup>  
 acie fugatis, a Tæcfarinate magis decore  
 suorum, quàm gloria hostis anxius, raro  
 ea tépestate, inquit Tacitus<sup>d</sup>. & e veterere <sup>d annal. l. 3.</sup>

DE IVRE ET OFF. BELL.

memoria, facinore, decimum quemque ignominiosæ cohortis forte ductos fuste necat: tantumque seueritate profectum, vt vexillum veteranorum non amplius quingenti numero, eadem Tacfarinatis copias fuderint. Ceterum non solum loco cedere, & fugere apud Romanos turpe fuit, & animaduersione dignum, sed etiam per deditiōem in potestatem hostium venire. itaque eos, qui armis victi se hostibus dedunt, postluminio ca- 4  
rere Vlpianus respondit<sup>a</sup>. Et quidem T. Vespasianus tam seueræ disciplinæ fuisse traditur, vt militem ab hostibus captum, qui solutis vinculis ad castra refugerat, vltra militare non siuerit, nec illi arma crediderit, quod viuus se ab hostibus capi permisisset. & senatus vel maximè at- tritis reip. viribus, cū magnum seruo- rum numerum a Pyrrho rege vltro mis- sum recepissent, decreuit ex sententia App. Claudij, vt ij qui equo meruerant, peditum numero militarent: qui pedites fuerant, in funditorum auxilia transcriberentur, nēue quis eorum intra castra tēderet, nēue locum extra castra assignatum vallo aut fossa cingeret, nēue tentorium ex pellibus haberet: & ita demum  
cos in

*a. in l. postli-  
minium. D.  
de captiv. &  
postl. reuerf.*

eos in pristinum militiæ ordinē restitui placuit, si bina spolia ex hostibus retulissent<sup>a</sup>. Pari seueritate senatus, cūm ei Annibal octo millia Romanorum, qui in castris relictī post Cannensem cladem, se Annibali dediderant, redimēdorum potestatem faceret, conditionem spreuit, & in eorum locum octo millia seruorū publicè empta armauit : qui miles magis placuit: cūm tamen precio minore redimendi captiuos copia fieret : memor tātam multitudinem armatorū iuuenum, si honestè mori voluissent, turpiter capi non potuisse : vt insitum esset Romanis, aut vincere, aut emori. qua quidē audita re fractum animum Annibalis ferunt : quod senatus populusque Rom. rebus afflictis tam excelsō animo esset<sup>b</sup>. Denique ij quoque, qui metu hostium languorem<sup>c</sup> simulant, capite puniri iubentur<sup>c</sup>. Est verò notatu dignum, quod Salustius de veteribus illis Romanis refert, quod in bello sæpius vindicatum fuerit in eos, qui contra imperium in hostem pugnauerant, quia tardius reuocati prælio excesserāt, quàm qui signa relinquere, aut pulsi loco cedere ausi erant.

<sup>a</sup> Val. Max. lib. 2. cap.

<sup>b</sup> Liu. l. 22. Val Max l. 2 c 7 Cicer. offic. lib. 3. c l. omne. §. solet. De de re milit.

DE IVRE ET OFF. BELL.  
DE IIS QUI ARMA ALIENANT  
VEL AMITTUNT.

- 1 *Arma in bello amittere vel alienare graue crimen.*
- 2 *Arma postliminio non redeunt.*
- 3 *Qui scutum vel gladium in acie amittit.*

CAPVT XVI.

**A**Rma veteres membra militum esse voluerunt : itaque graue crimé habitum fuit in bello arma amittere, vel alienare \*, & capite punitum <sup>a</sup>. & crimen <sup>1</sup> istud desertioni æquiparatur, si quidem tota quis alienasset, vel etiam si partem tantum: nisi quod interest. nam si tibiale vel humerale amisit, vel alienauit, verberibus castigari solet: si verò loricam, gladium, scutum, desertori similis est: nisi quod tyroni facilius parcitur <sup>b</sup>. Hinc est quòd arma non redire postliminio \* respondit Marcellus, quòd turpiter amittantur <sup>c</sup>. quare mirum quòd constitutio regni Hispaniæ arma in bello amissa ex præda forte facta refarciri iubeat <sup>d</sup>. Eadem tamen constitutio nobilibus ex hac causa infamiæ notam inurit, & nobilitatis prærogatiuam adimit <sup>e</sup>. Et certè arma in bello amittere, ignominiosissimum semper

<sup>a</sup> l. 3. §. miles. D. de re milit.

<sup>b</sup> l. qui committitur. §. arma. D. de re milit.

<sup>c</sup> l. 2. in fin. D. de capt. et postl. reuerf.

<sup>d</sup> Reg. l. 4. et §. 25. p. 2.

<sup>e</sup> Reg. l. ult. lib. 21. par. 2.

semper fuit. itaque M. Cato Censorij filius, in acie cadente equo prolapsus, cum se recolligeret, animaduerneretque gladium excidisse vagina, veritus ignominiam, in confertissimos hostes se immitens, aliquot vulneribus acceptis, recuperato gladio rediit ad suos. quo spectaculo attoniti hostes, postero die ad eos supplices pacem petentes venerunt<sup>a</sup>. L. autem Calpurnius Piso cons. C. Titium præfectum equitum, quòd fugitiuorum multitudine circumuentus, arma hosti cum suis tradidisset, toga laciniis abscessis amictum, distincta tunica & nudis pedibus ad principia per omne tempus militiæ adesse iussit<sup>b</sup>. App. Claudius a Volscis exercitu eius fugato, inuectus in proditorè exercitum militaris disciplinæ, desertorem signorū, vbi signa, vbi arma essent, singulos rogitās, inermes milites, signo amisso signiferos, virgis cæcos, securi percussit<sup>c</sup>. Lacedæmonij verò Archilochum poëtam vrbe exegere, quòd carmē scripserat, in quo suadere visus fuit, satius esse arma amittere, quàm vitam. At Spartanę mulieres exituros in militiam filios monebant, vt aut viui cum armis in conspectum suum redirēt, aut

<sup>a</sup> Val. Max.  
l. b. 3. c. 2. l. m.  
sim. lib. 33.

<sup>b</sup> Val. Max.  
lib. 2. cap. 7.

<sup>c</sup> Linius l. 2  
Dion. Hal.  
lib. 9.

D E IVRE ET OFF. BELL.

aut mortui cum armis referrentur. Ceterum apud Græcos militari lege cautū erat, vt miles, qui scutum in acie amisisset\*, capite lueret; qui verò gladium, leuiori pœna plecteretur: quia maioris disciplinæ se ab hostibus tueri & præstare incolumem, quàm cum sua pernicie hostem perdere summi duces existimauere. Quo spectat Scipionis Æmiliani dictū, Malle se ciuē seruare, quàm multos hostes perdere. Itaque Epaminondas traictus hasta, moribundus, primū an clipeus suus saluus esset, deinde an penitus fusi hostes forēt, interrogauit. quæ postquam ex animi sententia comperit, lætus obiit, inquit: Nunc vester Epaminondas nascitur, quia sic moritur<sup>a</sup>.

<sup>a</sup> Val. Max.  
lib. 3. cap. 2.

DE IIS QUI EXCVBIAS DESE-  
RVNT, VEL MINVS RECTE AGVNT.

- 1 *Excubia diligenter agenda.*
- 2 *Qui excubias palacy deseruit, capite punitur.*
- 3 *Dormiētes in statione quo modo puniēdi.*
- 4 *Captiuicustodia militum commissi si euaserint.*

CAPVT XVII.

**N**ON minima disciplinæ militaris pars est vigilias bene disponere, & excubias

bias maxima cura agere : quarum negli-  
 gentia plurimos exercitus cęsos, prostra-  
 tosque, & multa castra capta, ac oppida  
 occupata legimus. Itaque Thomyris re-  
 ginę filius somno vinoque sepultus, cū  
 toto exercitu a Cyro oppressus interiit<sup>a</sup>. a *lustin. lib. 1*  
 & L. Marcius, cum reliquiis exercituum,  
 extinctis Scipionibus, in Hispania bina  
 castra Pœnorum, vbi omnia victoria ne-  
 glecta solutaque inuenit, vna nōcte cęsis  
 1 hostibus cepit<sup>b</sup>. In vigiles igitur, quorū b *Li. lib. 25*  
 diligentia freti reliqui dormiūt, qui mi-  
 nus officio functi essent, meritō animad-  
 uersum fuit. Itaque Paulus eum, qui ex-  
 2 cubias palacij deseruit\*, capite puniri re-  
 spondit<sup>c</sup>. & Modestinus eum, qui statio-  
 nis munus reliquit, plusquam emansorē  
 esse, atque pro modo delicti aut castigari,  
 aut gradu deiici : qui verō ab excubatio-  
 ne præsidis, aut cuiusuis præpositi deces-  
 sit, peccatum desertoris subire dixit<sup>d</sup>. d *in l. deser-*  
*torem. §. qui*  
*stationis. cum*  
*§. seq. D. de*  
*re mil.*  
 Cū Galli in summum capitolij euasis-  
 sent, incuria vigilum, qui tandem benefi-  
 cio anserum excitati sunt, P. Sulpitius  
 tribunus militū, in vigiles eius loci, quos  
 fefellerat ascendens hostis, more militari  
 se animaduersurum pronunciauit : sed  
 consentiente clamore militum, in vnum  
 vigilem

DE IVRE ET OFF. BELL.

vigilem conijcientium culpam, deterritus, a ceteris abstinuit, & reum haud dubium eius noxæ approbantibus cunctis, de saxo deiecit<sup>a</sup>. Epaminondas verò cum custodias stationesque circumiret, ut disciplinam exēplis stabiliret, sopitum militem gladio transfixit<sup>\*</sup>, asserens, quod <sup>3</sup> qualem inuenerat, talem reliquerat<sup>b</sup>. & Augustus manipulares milites statione deserta, & centuriones morte multauit. Porrò ex constitutionibus regni Hispaniæ, solent dormientes in statione, tertio demū admoniti præcipitari de saxo, vel muris arcis, in quo fortè excubabant<sup>c</sup>. Qua autem ratione castrenses excubiæ constituerentur apud Romanos, quod officium circuitorum, qui vigilias circumibant, quæuè poena in eos, qui negligentiores essent, tradit Polybius<sup>d</sup>. Ceterum Paulus Æmilius, ut attentius custodiæ contra somnum pugnarēt, vigiles nouo more scutum in vigiliam ferre vetuit: nō enim in pugnam vigilem ire, ut armis utatur, sed ad vigilandum, ut cum senserit hostium aduentum, recipiat se, excitetq; ad arma alios<sup>e</sup>. Epaminondas Thebanis diem festum agentibus, omnibusq; vino & conuiuio deditis, solus squalidus & cogi-

<sup>a</sup> *Liv. lib. 5.*

<sup>b</sup> *Plut. in a-  
pop.*

<sup>c</sup> *Reg. lib. 9.  
tit. 18. par. 2.*

<sup>d</sup> *de Rom.  
Castram.*

<sup>e</sup> *Liv. l. 44.*

cogitabundus ciuitatem obambulauit, & familiari suo miranti, querētiq̄ue causam: Vt vobis omnibus liceat potare, & animo esse ocioso, respōdit<sup>a</sup>. Prudenter quoque Cambyfes Cyri pater, interrogatus quonam pacto vrbes optimè custodirentur, respondit: Si custodes nunquam sibi satis cautum ab hoste esse arbitrarentur. Solent etiam militum custodia committi captiui\*, qui si custodia eorum euaserint, pro modo culpæ castigantur, aut militiam mutant<sup>b</sup>. exquirendum tamen esse, an nimia negligentia militum euaserint, an casu D. Hadrianus rescripsit.<sup>c</sup>

<sup>a</sup> Plut. in a-  
pop<sup>b</sup>.

<sup>b</sup> l. milites, l.  
ult. D. de co-  
stod. reo.

<sup>c</sup> d. l. miles.

DE EO QUI ARCEM, VEL OP-  
PIDVM, CVIVS PRÆSIDIO IMPO-  
situs est, amittit, vel hostibus dedit.

- 1 Qui arcē nō tenuit, laesa maiestatis reus.
- 2 Pro arcis defensione mors recusanda non est.
- 3 Si prefecto arcis ab hoste capta nulla culpa imputari possit, an puniri debeat.
- 4 Prefectus quando non teneatur arcem defendere.
- 5 Arci male munita prefectus.
- 6 Vix est ut citra ignominiam arx hosti tradatur.

DE IVRE ET OFF. BELL.

- 7 *Boni ne an mali plus adferat reip. arcis  
exstructio.*
- 8 *Extraneis non facile accessus ad arcem cō-  
cedi debet.*

CAPVT XVIII.

**S**I serui dominis periculo capitis cu-  
stodiam domus, tam a domesticis,  
quàm ab extraneis præstare coguntur:  
quantiò magis illi, quibus custodia arcis  
vel oppidi, & publica salus commissa est:  
pro qua tuenda nullum periculum, nul-  
los cruciatus, nec mortē denique ipsam  
quisquam recusare debet: quare exactis-  
sima diligētia præstari debet in arcis cu-  
stodia<sup>b</sup>. Itaque lege Iulia maiestatis tene-  
tur<sup>\*</sup>, qui arcem non tenuit, aut castra ho-  
stibus concessit<sup>c</sup>. Itaque L. Rupilius cō-  
sul eo bello, quod cum fugitiuis gessit in  
Sicilia, Q. Fabium generum suum, quia  
negligentia Tauritanam arcem amiserat,  
prouincia iussit excedere<sup>d</sup>. C. Corta P.  
Aurelium Pecuniolā sanguine sibi iun-  
ctum, quem Liparitanæ obsidioni, ipse  
ad auspicia repetenda Messanam transi-  
turus, præfecerat, virgis cæsū gregalis  
militiæ munere inter pedites fungi coë-  
git, quòd eius culpa agger incensus, &  
pæne

a l. 1. in prin.  
D. ad S. C.  
Syllan.

b argumento  
l. 1. §. quia  
sciendū. D. de  
præfec. vigil.  
c l. 3. D. ad l.  
Iul. maiest.

d Val. Max.  
lib. 2. cap. 7.

pæne castra fuerant capta<sup>a</sup>. M. Antonius, <sup>a Val. Max. lib. 2. cap. 7.</sup> cùm agger ab hostibus incensus esset, ex his qui in opere fuerant, duarum cohortium legiones decimavit, & in singulos decuriones animaduertit, legatum cum ignominia dimisit, reliquis ex legione hordeum dari iussit<sup>b</sup>. T. Turpilius Syllanus Vaccæ oppidi præfectus, quòd vnus ex omnibus profugisset, omnibus suis militibus, qui in præsidio erant, per fraudem obruncatis, iussus a Metello causam dicere, postquam se parum expurgat, cõdemnatus, verberatusque pœnas capite soluit<sup>c</sup>. Q. Cincinnatus dictator, eo tempore, quo deuicti Æqui, & subiugum missi, L. Munitium, quem ab obsidione hostium liberauerat, cõsularum deponere coëgit, & omnium rerum prædã suo tantum militi dedit, indignum enim maximo imperio credidit, quem nõ sua virtus, sed fossa vallumque tutum præstiterat, cuique verecundia non fuerat, arma Romana metu trepida clausis portis contineri<sup>d</sup>. Porrò Alexander Macedo quendam castelli custodiæ præpositum ob desertam stationem nece multauit. & Carthaginenses, cùm Mainertini a Romanis præsidium accepissent, Carthagi-

DE IVRE ET OFF. BELL.

nienſium præſidio expulſo , præfectum præſidij , quòd formidine atque ignavia arcem amiſſiſſet, cruci affixerunt<sup>a</sup>. Veriſimè certè Alexander audiens Aornum, ſaxum in India , natura loci inexpugnabilem eſſe, ſed a formiduloſo homine teneri : Hoc facit, inquit, vt locus iſte iam facilis captu ſit<sup>b</sup>. Et præclare Lacedæmonius quidam nobilis, Philippo minitâti multis ſe prohibiturum, niſi ciuitas ſibi traderetur : Num, inquit, & pro patria mori prohibebis ? Fortiter quoque & prudenter L. Pinarius Ænnæ in Sicilia præfectus præſidij, quod in arce erat. nam Ænneſium principibus, qui de proditione præſidij pacti erant cū Himilcone, cū nulla occaſio fraudis pateret, propalam agentibus urbem, arcemque ſuæ poteſtatis eſſe debere, & claues portarū ſibi reddi cõtendentibus, eo quòd liberi in ſocietatem, nō ſerui in cuſtodiam traditi eſſent Romanis: ita Pinarius reſpondit: Se in præſidio impoſitum eſſe ab imperatore ſuo, clauesque portarum & cuſtodiam arcis ab eo accepiffe, quam nec ſuo, nec Ænneſium arbitrio haberet, ſed eius qui commiſſet, præſidio excedere apud Romanos capitale eſſe, & ne libero-

<sup>a</sup> Polyb. l. i. hift.

<sup>b</sup> Plut. in a. poph.

liberorum etiam suorum causa parentes sanxiffe. consulem Marcellū haud procul esse: ad eum mitterēt legatos, cuius iuris atque arbitrij esset. Ænnesibus verò negantibus se missuros, testātibus si verbis nihil agerent, vindictam aliquam libertatis suę quęsituros: Pinnarius saltem populi consilium sibi dari postulavit, vt sciret vtrum paucorum ea denunciata, an vniuersę ciuitatis essent, & consensu eorum concione in posterum diem indicta, & vna omnibus claves reddi iubentibus, cunctantiq̄ue & differenti ferociter minitantibus: tum præfectus, cū nihil proficeret toga, signum, vt conuenerat, militibus dedit, a quibus Ænneses impetu factō miserè trucidati sunt: & Ænna hoc facinore retēta est. Marcellus factum non improbavit, & prædam Ænnēsium militibus concessit: ratus timore deterritos temperaturos a proditione præsidiorum Siculos<sup>a</sup>. Et hæc certè, quæ hæcenus dicta sunt, conueniunt iis, quæ cōstitutionibus regni Hispaniæ statuta sunt, quibus cautum est, non debere quem<sup>2</sup> mortem recusare\* pro arcis defensione, pro qua tuēda fortiter se quilibet gerere debet, etiam contra patrem, filium vel

<sup>a</sup> Liv. l. 24.

DE IVRE ET OFF. BELL.

quondam dominum : neque tanti quis  
 facere debet mortem vel quodcunque  
 periculum, quæ sunt transitoria, quàm  
 infamiam, quæ illi, posterisque suis in  
 perpetuum inuritur, si honori suo non  
 satisfecerit<sup>a</sup>. & quidem necessitate famis  
 cogente, potius filium comedere debet,  
 quàm hosti arcẽ dedat iniussu Domini<sup>b</sup>.  
 neque excusabitur si dedat arcem, ex eo  
 fortè quòd hostes minitentur mortem  
 vxori, aut liberis, aut quibusuis aliis<sup>c</sup>. fa-  
 lus enim reip. charitati liberorum præ-  
 ferri debet<sup>d</sup>. Itaque Alphonsus Perez  
 Gulmannus, post semestrem Tarifæ ob-  
 sidionem, hostibus, nequicquam omni-  
 bus tentatis, minitantibus, nisi oppidum  
 dederetur, filium se illius, quem apud se  
 habebãt interfecturum: respõdit, filium  
 patriæ, neque cum immortalẽ genuisse,  
 quo se orbari, si fors ita ferret, quàm præ-  
 sidio decedere, & fidem frangere sibi po-  
 tius esse. illud enim fieri vel cum sua glo-  
 ria posse, hoc sine suo dedecore ac scele-  
 re non posse, atque ita filium in cõspectu  
 suo ab hoste nefario scelere necari passus  
 est. Et quidem huius disciplinæ tam se-  
 ueri censores fuere Hispani: vt ex eorum  
 constitutionibus præfectus arcis, etiam  
 alio

<sup>a</sup> Reg. lib. 12  
tit. 18. par. 2.

<sup>b</sup> Reg. lib. 7.  
tit. 17. par. 2.  
facit l. 1. et 2

C. de patr.  
qui filios dist.

<sup>c</sup> Reg. l. 6  
12. tit. 18.

par. 2. l. ult.  
tit. 21. par. 2.

l. 2. tit. 2. par.  
7.

<sup>d</sup> l. postlimi-  
nium § filius

quoque. D. de  
capt. & post.  
tinet.

alio ex iusta causa substituto, qui arcem hostibus tradidit, nihilominus sit reus criminis læsæ maiestatis<sup>a</sup>. Porro cum a iusticia alienum sit quem sine culpa puniri, & qui culpa vacat, etiam a pœna liber esse debeat<sup>b</sup>: si præfecto arcis fortè ab hostibus captæ, vel iis deditæ nulla omnino culpa aut negligētia imputari possit<sup>\*</sup>, eum etiam a pœna securum esse debere æquitas suadet<sup>c</sup>. cuius rei etiam a veteribus rationem habitā fuisse indicat certamen de M. Liuo præfecto arcis Tarentinæ, aliis sententiis suis notantibus præfectum, quòd eius socordia Tarētum proditum hosti esset, aliis præmia decernentibus, quòd per quinquennium arcē tutatus esset, maximeque vnus eius opera receptum Tarentum esset: mediis ad censores, non ad senatum notionem de eo pertinere dicētibus<sup>d</sup>. Et L. Attilio præfecto præsidij Locrensis, cum videret deditiōnem a ciuibus ad Pœnos factam impedire non posse, vitio datum nō fuit, quod secum militibus Romanis, qui cū eo erant, vt eos crudelitati hostiū eriperet, & reipubl. incolumes seruaret, Rhegium deuchi passus est<sup>e</sup>. Itaque qui ne-

e 4            quodam

<sup>a</sup> Reg. l. 1. §  
6. tit. 28. p. 20

<sup>b</sup> *fancimus.*  
*C. de panis. c.*  
*sine culpa de*  
*reg. iur.*

<sup>c</sup> *facit l. mi-*  
*lites. l. vlt. D.*  
*de cust. roor.*

<sup>d</sup> *Liu. l. 27.*

<sup>e</sup> *Liu. l. 24.*

DE IVRE ET OFF. BELL.

quodam loco ait Liuius, superare possunt, omni humana ope destitutus, arcē hosti tradit, cum nullo supplicio dignū esse existimo. nam qui facit quod potuit, legem impleuit. & vasallus non tenetur fidelitatem præstare domino, nisi quatenus facere potest<sup>a</sup>. impossibile enim nulla est obligatio. Vnde eos qui necessitate coacti Schorā arcem a Turcis obsessam iisdem dederant, Venetias reuersos in nullam reprehensionem venisse refert Egnatius<sup>b</sup>. intelligebat enim senatus, quanta vis esset necessitatis, cui nulla virtus potest resistere. hinc plerique existimant ciuitatem, quæ iusto præsidio caret, excusari a crimine læsæ maiestatis, si hosti dedatur<sup>c</sup>: præsertim si non mittatur subsidium<sup>d</sup>: & præfectum arcis non teneri arcem defendere<sup>e</sup>, si rex ea quæ ad 4 defensionem sunt necessaria, non suppeditet<sup>e</sup>. Quò facit quod vasallus non tenetur domino seruitia præstare, nec eum recognoscere, quoties derelinquit vasallum in necessitate<sup>f</sup>. & Carolus Molinæus<sup>g</sup> tradit, quod antiqui reges Galliæ, vrbibus, quas defendere non poterant, permittebant se hostibus dedere. Itaque existimo præfectum arcis fortè male munitæ,

a c. ult. de feu. sim. cul. non amitt. & ibi. Aluaro et alij Gloss. & Bald. in c. 1. in prin. dist. ut.

b de exemp. illust. viro. lib. 7. cap. 6.

c Matth. de Afflic. ad cō. sit. reg. quæ incipit dūbi- rationem.

d Ioan. Imol. concil. 34.

Decret. con. 600. nu. 13.

Panor. conc. 3 nu. 5. lib. 1.

e Hieron. Grat. conc. 5. & concil. 51.

lib. 1.

f c. 1. qual. dom. et propr. & ibi Alua-

ro, & alij in c. 1. §. Domi-

no cōtinente, et ibi Bald. et

alij tit. si de feu. sue. cōtr.

int. dom. & agn.

g in addit. ad eor. dec. 604.

5 nitæ\*, omni ope humana & spe subsidij destitutum, quiq̃ue vim hostium ferre non possit, pacto vel quocunque modo sibi, & præsidio posse consulere, & arcem relinquere, præsertim cùm omnibus nequicquam tentatis, arcem æquè in potestatem hostium venturam fuisse constet. non enim exspectandum est id, cuius eventus nihil operari potest<sup>a</sup>. Quò facit quod debitor speciei etiam in mora cõstitutus, non tenetur de interitu rei, quæ æquè apud creditorem erat peritura<sup>b</sup>. non tenebitur ergo arcis præfectus se præsidiumq̃; indubitatè morti obijcere, qua non tam rempub. seruat, quàm prodit. Vnde Callicratidas Lacedæmoniorũ dux meritò culpatus fuit, qui classis; quàm priuatæ gloriæ iacturã facere maluit: & Cleombrotus, qui inuidiam timens, temerè cum Epaminonda cõllixit, & Lacedæmoniorũ opes euertit<sup>c</sup>. magni enim viri, vt inquit Q. Curtius, magis est contemnere mortem, quàm odisse vitam. & ita quidem moriendum esse pro patria docet Cicero<sup>d</sup>, si morte nostra patriæ profuturi sumus. Quacunque itaq̃; ratione omnino salutis reipubl. & patriæ consulendum erit, siue deditioe, siue

a l. stipulatio, §. diues. D. de leg. nom. caus.

b l. si plures. D. de pos. l. illi. D. de petit. hered. l. quod te, & ibi in scriptis. D. si cert. petat.

c Cicer. off. lib. 1.

d offic. lib. 1.

DE IVRE ET OFF. BELL.

morte, si opus sit. vir enim fortis nihil sua, omnia pro communi vtilitate facere debet, vt alio loco ostēdimus<sup>a</sup>. His adde quod ex cōstitutionibus regni Hispaniæ, quæ alioqui satis seuerę sunt, is qui mandato regis arci male cōstructæ, & immunitæ, ita vt defendi non possit, præfectus fuerit, idque regi indicauerit, nō incidit in crimen læsæ maiestatis, si hostis vi, & sine culpa præfecti arce potiatur<sup>b</sup>. Potest quoque præfectus arcis ex hac causa, reddita ratione, cur defendi non possit, etiã non expectato hostium impetu, si forte rex non miserit successorem, arcem deserere, secundum normam iisdem cōstitutionib. præscriptam: si puta ipse præfectus noluerit suscipere defensionē arcis<sup>c</sup>. Ceterum vt vt sit, non nisi magno iudicio ad arcis, vel oppidi custodiam quis accedere debet, & ita se gerere, vt si fortè quid aduersi contingat, & necessitate ad deditiōem compellatur: vt non tã videatur id metu mortis fecisse, quàm vt se suosque reipubl. conseruaret, & ex arce mox omnino futura hostium, saltē præsidium reipubl. eriperet. & certè vt maximè viri fortis officio functus sit, tamen vix est, vt citra ignominix notam arcem

<sup>a</sup> 7. de officiis  
bellicis lib. 2.

<sup>b</sup> Reg. lib. 4.  
& 6. tit. 18.  
par. 2.

<sup>c</sup> Reg. l. 20.  
tit. 18. par. 2.

6 arcem tradat\*. nam si turpe apud veteres habitum fuit, militem vnum in potestatem hostium venire, vt superius ostendimus<sup>a</sup>: quid de præfecto dicemus, qui præsidio impositus & iureiurando ad defensionem arcis se astrinxit. Nihilominus subeunda erit potius hæc ignominia, si ita reipub. expediat, quam nequicquam defendendo, & se suosque dedêdo ad necem, patriam deserere, ac prodere: vt alio loco diximus<sup>b</sup>. Sed & aliæ sunt partes præfecti, aliæ militis: hic fortiter pugnare, ille quod reipub. expedit curare debet. Porro non mediocris disceptationis fuit inter eos, qui de republ. scripserunt, boni ne an mali plus adferat reipub. arcis exstructio\*. & quamuis pleriq; inutilem & periculosam esse arcem in optima rep. existiment, Roma tamê a Gallis capta præsidio Capitolij recuperata fuit: & Ænna oppidum, de qua superius diximus, arcis & præsidij beneficio seruata fuit. Multas itaque puto posse existere causas, ex quibus utilis, imo necessaria sit arcis cõstructio: tam ad hostium impetum excipiendum, quàm ad ciues in pace conseruandos. Quod reliquũ est, arcis præfectos monitos velim, ne facile

extra-

<sup>a</sup> c. de iis qui in acie loco cedunt. 5.

<sup>b</sup> supra. de off. bel. lib. 2.

DE IVRE ET OFF. BELL.

extraneis\*, præsertim fortibus viris, & 8 principibus, aditum in arcem præbeant, memores cōsilij Pyrrhi Epirotarum regis : qui cū Athenas venisset, & in arcē Palladis deductus esset, natura & arte munitissimā, quā magna admiratione contemplatus erat, monuit principes civitatis, qui eum comitabantur, ne in posterum vlli regum potestatem facerent amplius arcem ingrediendi, ne opportunitatem præsidij nactus quispiam eam inuaderet : quod consilium gratum fuit Atheniensibus.

DE FVRTIS ET ALIIS QVIBVS-  
DAM DELICTIS MILITARIBVS.

- 1 *Milites in furto deprehensi quomodo puniendi.*
- 2 *Tribuni quale iusiurandum exigere solēt.*
- 3 *Non licuit longius a tubæ audite discedere.*
- 4 *Commilitonem gladio ferire capitale.*
- 5 *Dare se militem, cui nō licet graue crimē.*
- 6 *Qui se pro milite gerit punitur.*
- 7 *Qui se pro ciue gerit punitur.*

CAPVT XIX.

**N**ON aliā ob causam, vt est apud Platonem de rep. homo in lupum conuersus

uerfus fuisse a pœtis fingitur, quàm quòd rapinis & furtis dediti, hominem & humanitatem prorsus exuisse videantur, sintq; iam non tam reipsa homines, quàm nomine. ideoque grauibus pœnis coërcendi sunt: & quamuis nulla pœna corporalis ob furtum, iure ciuili inter ciues statuta sit: solent tamẽ imperatores, ad firmandam disciplinam militarem, a militibus in furto deprehensis seueriores pœnas exigere\*. Itaque Tiberius militem prætorianum, ob surreptum e viridario pavonem, capite puniuit <sup>a</sup>. Aufidius Cassius milites, qui prouincialibus vim aut damnum inferrent, in crucem sustulit: exstantque in hanc rem innumera veterum imperatorum exempla. Paulus verò I. C. militem in furto balneario deprehensum, ignominia mittendum respondit <sup>b</sup>. Solent autem tribuni, <sup>b in l. ult. D. de furt. bal.</sup> vbi castra metata essent\*, ab omnibus liberis & seruis, qui in castris erant, iusiurandum exigere, se nihil e castris furto ablaturos; & si quis quid inuenisset, id ad tribunos allaturum <sup>c</sup>. eiusque iurisiuradi formulam refert Gell <sup>d</sup>. & vt a rapina cõtinerentur milites, non licuit longius a <sup>c Polybius de Rom. castr. d lib. 16. c. 4</sup> tubæ auditu\*, nisi imperatoris aut tribuni iussu,

DE IVRE ET OFF. BELL.

ni iussu, extra munimenta abire, neque agmē excedere: qua de re alibi diximus<sup>a</sup>.

<sup>a</sup> supra. de e-  
manforib.

M. Cato in furto comprehensus inter cō-  
militiones dextras debere præcidi cœsivit.

<sup>b</sup> in l. 3. §.  
quis aliena. D.  
de re milit.

Modestinus eum, qui arma aliena surri-  
puit, gradu militiæ pellendum respōdit<sup>b</sup>.

Et sedulò olim cauebatur, vt maximum  
militum vinculum putarēt singulorum  
amorem, velut inexplicabilem nexum:  
vnde etiam commilitonem gladio ferire

\* capitale fuit: qui autem lapide vulne- 4

<sup>c</sup> l. omnia. §.  
si quis. D. de  
re milit.

rasset, militia reijciebatur<sup>c</sup>. Præterea mi-  
les honoris sui prodigus, qui pecunia

transigit cum mœcho vxoris suæ, sacra-  
mento soluitur, & deportatur<sup>d</sup>. Graue

<sup>d</sup> l. miles D.  
ad l. lul. de a-  
riule.

quoque crimen habetur, dare se militē\* 5  
cui non licet: & augetur, vt in ceteris de-

<sup>e</sup> l. 2. D. de re  
milit.

lictis, dignitate, gradu, specie militiæ<sup>e</sup>.

Qui autem pro milite se gerit\*, cū mi- 6

<sup>f</sup> l. eos in fine.  
D. ad l. Cor.  
de falsis.

les non sit, punitur poena falsi<sup>f</sup>. Quò spe-  
ctat lex a Crasso & Scæuola const. Iara:

<sup>g</sup> Cicero off.  
lib. 3.

ne scilicet quis, qui ciuis\* non est, pro 7

<sup>h</sup> Tranquil  
in Claud.

ciue se gerat g: isque peregrinitatis reus  
dicebatur<sup>h</sup>. Est autem poena falsi depor-

<sup>i</sup> l. 1. D. ad l.  
Corn. de fals.

tatio, cum publicatione bonorum i.

DE PRAEMIIS MILITVM.

- 1 Respubl. optimè gubernatur pœna & pra-  
mio.

2 Mili-

- 2 *Milites præmiis excitandi.*
- 3 *Multa præmia militibus proposita.*
- 4 *Optima spolia qua.*
- 5 *Triumphus quando decerni solitus.*
- 6 *Mos triumphandi quamdiu manserit apud Rom.*
- 7 *Romani ex prouinciis & oppidis subactis nomina sumebant.*
- 8 *Militaria dona varia fuere.*
- 9 *Militares corona qua.*
- 10 *Proposito præmio primùm muros ascendenti, si plures simul conscendant.*
- 11 *Præmia parentibus mortuis debita conceduntur filiis.*

## CAPVT XX.

1 **N**VLLA re melius reip. gubernari, quàm pœna & præmio\*, multis philosophorum sententiis comprobatū est. ex quibus Solon, qui sapiens vnus ex septem, & legum scriptor solus fuit, reip. constare dixit. & Democritus duos omnino deos esse cēsuit, Pœnam & Beneficium. Lyfander rogatus, quam reip. formam maximè probaret: in qua, inquit, fortibus & ignauis suū tribuitur<sup>a</sup>. Theophrastus interrogatus, quidnam vitam humanam maximè conseruaret, respon-  
dit, be-

<sup>a</sup> Plut. in a-  
popb.

DE IVRE ET OFF. BELL.

dit, beneficium & pœna. Cicero neque domum, neque rempub. stare posse, si in ea nec rectè factis præmia exstent vlla, nec supplicia peccatis asserit<sup>a</sup>. Et nemo in reip. periculis cū laude ac virtute versatur, vt idem ait, quin spe posteritatis fructuque ducatur<sup>b</sup>. Apud quos autem maxima virtutis præmia proponuntur, apud illos etiam optimos viros gubernare dixit Thucydides. vbi enim vberissima virtutis præmia proposita essent, ad ea optimo quosque in rempubl. animo contendere. & vt Plinius ad Traianum scripsit<sup>c</sup>: Præmia bonorū malorumque, bonos ac malos faciunt: omniumque beneficiorum, quæ merentibus tribuuntur, non ad ipsos gaudium magis, quam ad similes redundat. atque eò impendi laborem ac periculum dicit Liuius<sup>d</sup>, vnde emolumētum atque honos speretur, nihilque non aggressuros homines, si magnis conatibus magna præmia proponantur, magnosque animos magnis honoribus fieri. Itaque Socrates ciuitatem optimā esse dixit, in qua plurima virtuti præmia essent proposita. Vnde Demosthenes<sup>e</sup>: Studio, inquit, & magnæ curæ vobis esse debet, Athenienses, cū vt omnes

<sup>a</sup> de nat. deo.  
lib. 2.

<sup>b</sup> orat. pro  
Rabir.

<sup>c</sup> in Panegy.

<sup>d</sup> lib. 4.

<sup>e</sup> aduersus  
Lept.

omnes leges vestræ præclarissimæ sint, tum verò hæ imprimis, quæ ciuitatē aut magnam aut paruam efficere possunt. eæ verò quæ sunt hæ nimirum, quæ & bene meritis honorem habent, & improbos suppliciis coërcent. nam si omnes pœnarum metu, quæ legibus sancitæ sunt, maleficiis omnibus abstineât, & omnes præmiis beneficiorum inuitati officium facere studeant: quid obstat, quo minus ciuitas florentissima efficiatur? Quare quemadmodum aspero castigationis genere militaris disciplina indiget: ita quoque præmiis ad virtutem\* excitandi sunt milites. in quo a plerisque peccatur, eo quòd, vt Tacitus ait, procliui<sup>9</sup> sit iniuriæ, quàm beneficio vicē exsoluere: quia gratia oneri, vltio in quæstu habetur: cū tamen ideo multæ pereant resp. vt ait Euripides in Hecuba, quòd qui bonus & strenuus est vir, nihil plus quàm ignauus fert præmij. Cyrus autē militari virtute præstantibus viris maximum honorem habuit, & multis eos præmiis affecit. Apud Romanos quoque plurima virtutis præmia\* militibus proposita fuere, quæ hic obiter recensēbimus. Itaque imprimis ducibus, regibusque, quorum au-

f            spicio

DE IVRE ET OFF. BELL.

spicio res gerebantur, quiq̄ue suismet  
corporibus dimicantes, spolia hostium  
ducibus detraxissent, quæ opima\* voca- 4  
bant, præmij causa tributum est, vt opi-  
ma illa spolia Ioui Feretrio in capitolium  
ferrent: quæ ter solum a Romanis duci-  
bus, qui fortem strenuamq̄ue operam  
reip. nauarunt, delata fuisse comperimus.  
Prima Romulus vr̄bis auctor & parens,  
de Acrone Cæninensium duce, post raptas  
Sabinas detulisse fertur: quo tempore  
<sup>a</sup> *Liv. lib. 1.* Iouis Feretrij templum dicauit<sup>a</sup>. neque  
magno post interuallo, Cornelius Cos-  
sus, dux ea tempestate inclytus, secunda  
detulit opima spolia de Larte Tolunio,  
<sup>b</sup> *Liv. lib. 4.* rege Veientium, quem acie vicit & con-  
fecit<sup>b</sup>. tertia Claudius Marcellus manu  
strenuus, & bonus imperator, de Virido-  
maro Gallorum duce, apud Padum victo,  
<sup>c</sup> *Val. Max. lib. 3. cap. 2.* opima spolia deportauit<sup>c</sup>. Fuerunt præ-  
terea summis ducibus ob rem bello bene  
gestam triumphi decreti\*: quæ maxima 5  
merces victoriæ fuit. sed non ex quibus-  
cunque victoriis triumphare licitum fuit:  
sed cum bellorum & victoriarum causæ  
eo munere dignæ viderentur. fuit enim  
lege cautum, ne quis triumpharet, nisi  
qui quinque millia hostium vna acie cæ-  
cidisset.

cidisset, & magnas copias iusta acie fudisset. poena imperatoribus inflictâ, qui aut hostium occisorum in prælio, aut amissorum civium falsum numerum senatui referrent. nam nec eum qui magnis acceptis cladibus, & nimium cruēta victoria esset potitus, tanquam lugubri & parvi compendij, quòd multis funeribus, non multis commodis remp. affecisset, triumphare passi sunt. Fuit quoque lege cautum, vt non nisi pro aucto imperio, non pro recuperatis his quę bello amissa erant, triumphus cuiquam decerneretur: & quidē ita demum, si suo ductu & auspicio, & in sua, non in aliena provincia, eaque pacata, & nullo manente bello hostes profligasset & vicisset. Præterea si contra piratas, seruos, aut fugitivos, vel aliud genus hominū Romano nomine indignum bellatum foret, tanquam belli causa erubescenda, quamvis parta victoria, aut hostibus fuis, euerfisque, nemini triumphare licuit. Fuit quoque animaduersum, tametsi fuis fugatisque hostibus res triumpho dignas imperatores gessissent, si tamen neque consul, neque prætor exercitui præfuisset: & nisi legitimum haberet magistratum, cu-

DE IVRE ET OFF. BELL.

ius ductu & imperio victi essent, & profligati hostes, triūphare nemini fas fuit. Sed & ex duobus imperatoribus in magistratu positis, illi qui supremo gradu erat, soli triumphare permissum fuit: ne scilicet in honore triumphi minor potestas maiori equaretur: neue auspicia, quę maioris magistratus erant, cum minoribus confunderentur. ideoque consul cū dictatore aut prætore non triumphabat. ex his autem causis, ex quibus Romani duces triumphare non potuerunt, minoribus triūphis & ouatione honestati sunt. Porrò quantumuis quis præclaras res maximeque vtilis reipubl. civili bello gessisset, imperator tamē eo nomine appellatus non est, neque vllæ supplicationes decretæ sunt, neque aut ouans, aut triumphans urbem intrauit: quia vt necessariae istæ; ita lugubres semper existimatæ victoriæ sunt: vtpote non externo, sed domestico parte cruore. Constat quoque ciuem Romanum, quamuis reipubl. perniciosum & infestum, bello victum in triūpho duci nō potuisse. Mansit autē mos Romæ de domitis nationibus bello victis triumphandi\*, ad Probū 6 vsque imperatorem, qui vltimus Cæsarium triumph-

triumphasse dicitur. Plura de iure triū-  
 phandi, & quo apparatu & pōpa Roma-  
 ni triumphos agerent: videre licet apud  
 Val. Max<sup>a</sup>. & Alexand. ab Alex<sup>b</sup>. Solent  
 quoq; Romani duces honoris causa, ex  
 oppidis & prouinciis vi subactis cogno-  
 7 menta delumere\*, vt tres Metelli: vnus  
 ex deuicta Numidia, Numidici: alter ex  
 Macedonia, Macedonici: tertius ex Cre-  
 ta, Cretici cognomenta sumpserunt. Fuit  
 quoque Metellus Balearicus, ex deuictis  
 Balearibus denominatus: Marrus Co-  
 riolanus, ex Coriolis oppido Volscorū:  
 duo Scipiones Africani, maior & minor,  
 ex Africa: & Scipio quoque Asiaticus, ex  
 Asia cognomina tulere. similiter & alij  
 quamplurimi, quorum exempla secuti  
 postea Cæsares, ex bello domitis genti-  
 bus nationibusque illustra cognomēta  
 ad immortalem gloriā tulere. Sæpe po-  
 puli decreto, nonnunquā acclamatione  
 senatus. vnde Arabici, Adiabenici, Par-  
 thici, Armenici, Germanici, Sarmatici,  
 Africi diuersis titulis cognomina cepe-  
 re. Porro militaria dona, quæ priscis tē-  
 8 ria\*: & quidē precia militiæ inter alia hæc  
 f 3 habita

<sup>a</sup> lib. 2. cap. 8

<sup>b</sup> genial. dier.

lib. 1. cap. 22.

<sup>c</sup> lib. 6. c. 6.

¶ 17.

<sup>c</sup> Alexand.

ab Alexand.

genial. dier.

lib. 2. cap. 11.

DE IVRE ET OFF. BELL.

habita sunt maxima : vt post exhaustos labores, milites emeritis stipendiis, sanguine & sudore partis agris donarentur. hos enim lætissimos fructus, velut optimam prædam laborum periculorumque accipiebant<sup>a</sup>. Præter hæc, vt ad decora militiæ magis accenderent animos, quoque honoratior testatiorque eorum virtus foret, præmio proposito militares coronas, ampliissimaque alia honoris munera inuenere : vtpote aureos torques, duplicem annonam, interdum militiæ vacationem, nonnunquam duplex stipendium ob virtutis præmium imperatores largiti sunt : fuereque illi, quorū opera in bello insignis exstitisset, perditæque & afflictæ res restitutæ essent, pluries donis muneribusque affecti. Itaque legimus L. Sicinium Dentatum, virum clarum ingenio factisque, ob egregia facinora militaria, præter octo aureas coronas, ciuicas quatuordecim, murales tres, obsidionalē vnā, torquibus clxxxiiij. armillis clx. hastis puris duodeuiginti, phaleris viginti quinq; donatum fuisse<sup>b</sup>. huic proximus fuit Mālius Capitolinus, qui spolia hostiū cæsorū ad xxx. retulit, & dona imperatorum ad xl. accepit : in quibus

<sup>a</sup> patet ex l. item si verberatum. §. itē ff. D. de res vendic ex l. in agris D. de acq. rer. dom.

<sup>b</sup> Vol. Max. lib. 3. cap. 2.

quibus duas insignes murales coronas, ciuicas octo<sup>a</sup>. Nemo autem, qui præclarū a Liu. l. 6.

facinus gesserat, prout cuiusq; meritum virtusq; fuisset, militaribus donis indo-

9 natus abiit. Militares verò coronæ\* fuerunt multifariæ: triūphales, ouales, obsidionales, ciuicæ, murales, nauales, castrêses, quibus donabâtur imperatores, & alij, qui vrbes, castra, aut exercitus obsidione liberassent, ciuemque seruassent, primūmue muros hostium ascendisset b. b. Cell. noct. Ast. lib. 3. c. 6.

10 Porrò proposito præmio\*, primū muros hostium ascēdenti, si duo vel plures vna conscēdant eodē momēto, an præmium omnibus debeat, quæri solet; an verò

nemini. & videtur nemini deberi<sup>c</sup>: quòd inuicē sibi obstat, & alter alteri sit impedimēto<sup>d</sup>, & inter partes nulla possit esse

viçtoria<sup>e</sup>. idq; verū est, si constet imperatorem vni tantū dari voluisse<sup>f</sup>: utpote si

pro præmio assignet talē equū: nec enim huiusmodi species multiplicationē recipit. alioqui verò omnibus præmium deberi existimo. Nam, ut Africanus respō-

dit, primus nō solūm is dicitur, qui ante aliquē est; sed etiā is, ante quē nemo est.

& Paulus<sup>h</sup>: Proximus est, inquit, quem

nemo antecedit. Idē dicendū erit, etiam si

dubium

c l. si fuerit. D. de rebus dubiis.

d l. inuicem. D. de here. inst.

e l. si rem. D. de duob. reis.

f argumento d. l. inuicem.

g in l. ex duobus. D. de vul. et pupil.

h in l. proximus. D. de verb. signif.

DE IVRE ET OFF. BELL.

a *argumento*  
*l. qui duos.*  
*l. si fuerit. §.*  
*vlt. D. de reb.*  
*dub.*

dubium sit, quis prior conscēderit<sup>a</sup>, idq;  
 etiam Scipio secutus est. nam cū capta  
 Carthagine noua, inter Q. Tyberiliū cē-  
 turionem legionis quartæ, & Sex. Digi-  
 tium sociū naualē, magna contētio, quæ  
 prope seditionem esset, oriretur, & quili-  
 bet profiteretur se primū murum ascē-  
 disse: ideoq; muralis coronæ decus ad se  
 pertinere: Scipio cōcione aduocata pro-  
 nūciauit, se satis compertum habere, Q.  
 Tyberiliū & Sex. Digiitiū pariter in mu-  
 rum ascendisse, seque eos ambos virtutis

b *Liv. l. 26.*

causa coronis muralibus donare<sup>b</sup>. Au-  
 gustus autem facilius phaleras, torques,  
 & quicquid auro constaret, quàm mura-  
 les, castrēses, aut ciuicas coronas munera  
 dedit. Ceterum constitutiones quoque  
 Hispaniæ multa præmia iis, qui fortem in  
 bello operam nauarunt, tribuit<sup>c</sup>: quæ &

c *lib. 27. p. 2.*

filiis dona parētibus mortuis debita<sup>c</sup> cō- II

d *Reg. l. 5.*

*lib. 27. par. 2.*

cedit<sup>d</sup>. quod Pisistratus olim cauisse fer-  
 tur. Lege verò Solonis apud Atheniēses  
 cautum fuit, vt præter ea dona, quæ mili-  
 tibus duces impartiti fuerant, filij qui in  
 bello occubuissent, publicè alerentur, &  
 bonis disciplinis instruerentur. & Con-  
 stātinus filios in paternam militiam vo-  
 cari voluit.<sup>e</sup>

e *in l. 1. et 2.*  
*C. de fil. offic.*  
*mil. lib. 12.*

F I N I S.

## NOTE AS TO ERRATA IN THE ORIGINAL TEXT.

[Extracted from Translator's Note in second volume of this work.]

### CORRECTIONS OF THE TEXT.

For the purposes of the translation the following corrections of the text as reproduced photographically in Vol. I have been adopted:

| Page                                                            | Page                                                                                                                                               |
|-----------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| 13, l. 3 from bottom, <i>read sine. .sine for siue. .siue.</i>  | 150a, l. 15, <i>read ager for agger.</i>                                                                                                           |
| 52a, l. 15, <i>dele ab.</i>                                     | 151, l. 6 from bottom, <i>read præbituri for perituri.</i>                                                                                         |
| 53a, l. 7, <i>read debitori for creditori.</i>                  | 184a, l. 8, <i>read Macer for Marcianus.</i>                                                                                                       |
| 65a, l. 7, <i>read inultum for multum.</i>                      | 187, l. 30, <i>read Marcus for Decius.</i>                                                                                                         |
| 65a, l. 11, <i>read fastigio for flagitio.</i>                  | 194a, l. 10, <i>read duces for duce.</i>                                                                                                           |
| 71, l. 9, <i>read induciis for iudiciis.</i>                    | 210, l. 7 from bottom, <i>read Luceriam for lucernam.</i>                                                                                          |
| 98a, ll. 14, 15, <i>read veritatem for a veritate.</i>          | 211, l. 3 from bottom, <i>read dedecore for decore.</i>                                                                                            |
| 98a, l. 15, <i>read nimis for ius.</i>                          | 215a, l. 8 from bottom, <i>read Tauromenianam for Tauritanam.</i>                                                                                  |
| 98a, l. 17, <i>read sine for siue.</i>                          | 218a, l. 9, <i>read Schodram for Schoram.</i>                                                                                                      |
| 109, l. 12, <i>read mihi for tibi.</i>                          | 226, l. 11 from bottom, <i>read pares for partes.</i>                                                                                              |
| 131, l. 14, <i>insert iniusta before pœna.</i>                  | [Note also, p. 4, l. 9, the usual reading is <i>oratores</i> , not <i>oratorum</i> . And, query, p. 146, l. 4, <i>read coortos for cohortes?</i> ] |
| 133a, ll. 19 and last, <i>read Lavinii for Lanuvini.</i>        |                                                                                                                                                    |
| 136a, l. 2 from bottom, <i>insert non before concedentibus.</i> |                                                                                                                                                    |
| 144, l. 12, <i>insert plena before ciuium.</i>                  |                                                                                                                                                    |
| 146a, l. 20, <i>read exanimarentur for examinarentur.</i>       |                                                                                                                                                    |

### ERRORS IN THE MARGINAL REFERENCES.

These are not uncommon, and the second edition—which was published at Antwerp in 1597, therefore after Ayala's death—gives very little help in detecting them. The most usual error is in a number, say of a Book of Livy or of a *Causa* in the Decretum: sometimes a passage is assigned by mistake to the Digest instead of to the Code: sometimes a small, but disconcerting slip is made in the name of a Title in the Digest or the Code (thus *de non fœn.* is given for *de nautico fœn.*).

It is not proposed to give a list of such errors as have been found: instead, the translator has corrected them in the margin of the translation. In the few cases where he remains baffled (whether by an error or by an obscurity) he has printed the reference as it stands in the original (see, e. g., note *a*, p. 100a, vol. 1, and note *a*, p. 219, vol. 1.).







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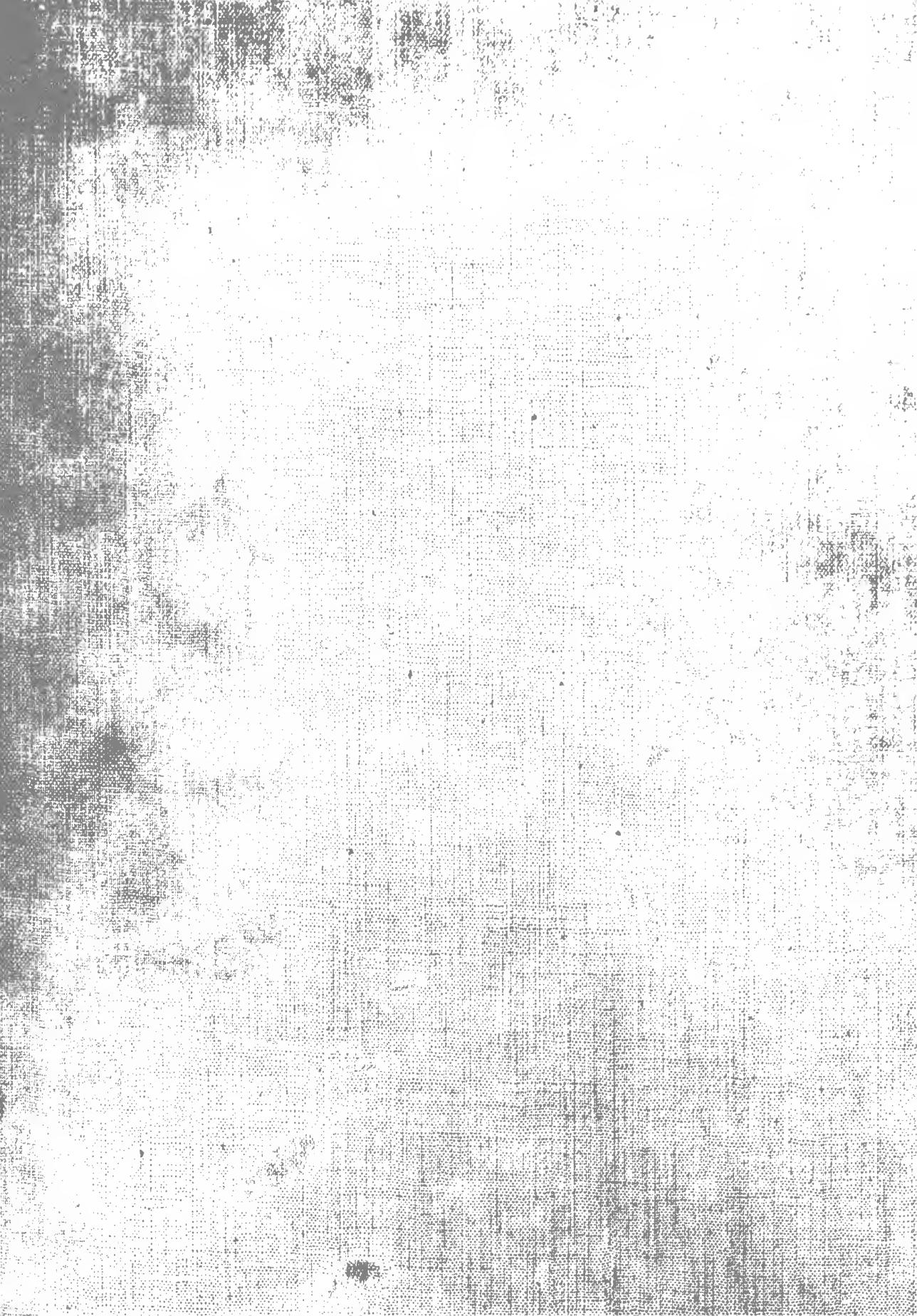


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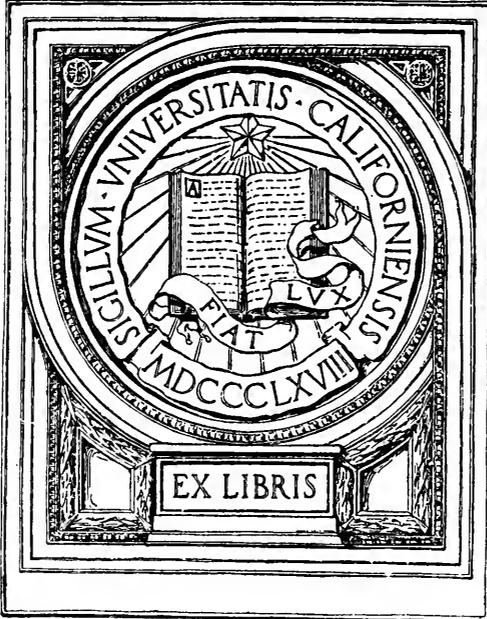








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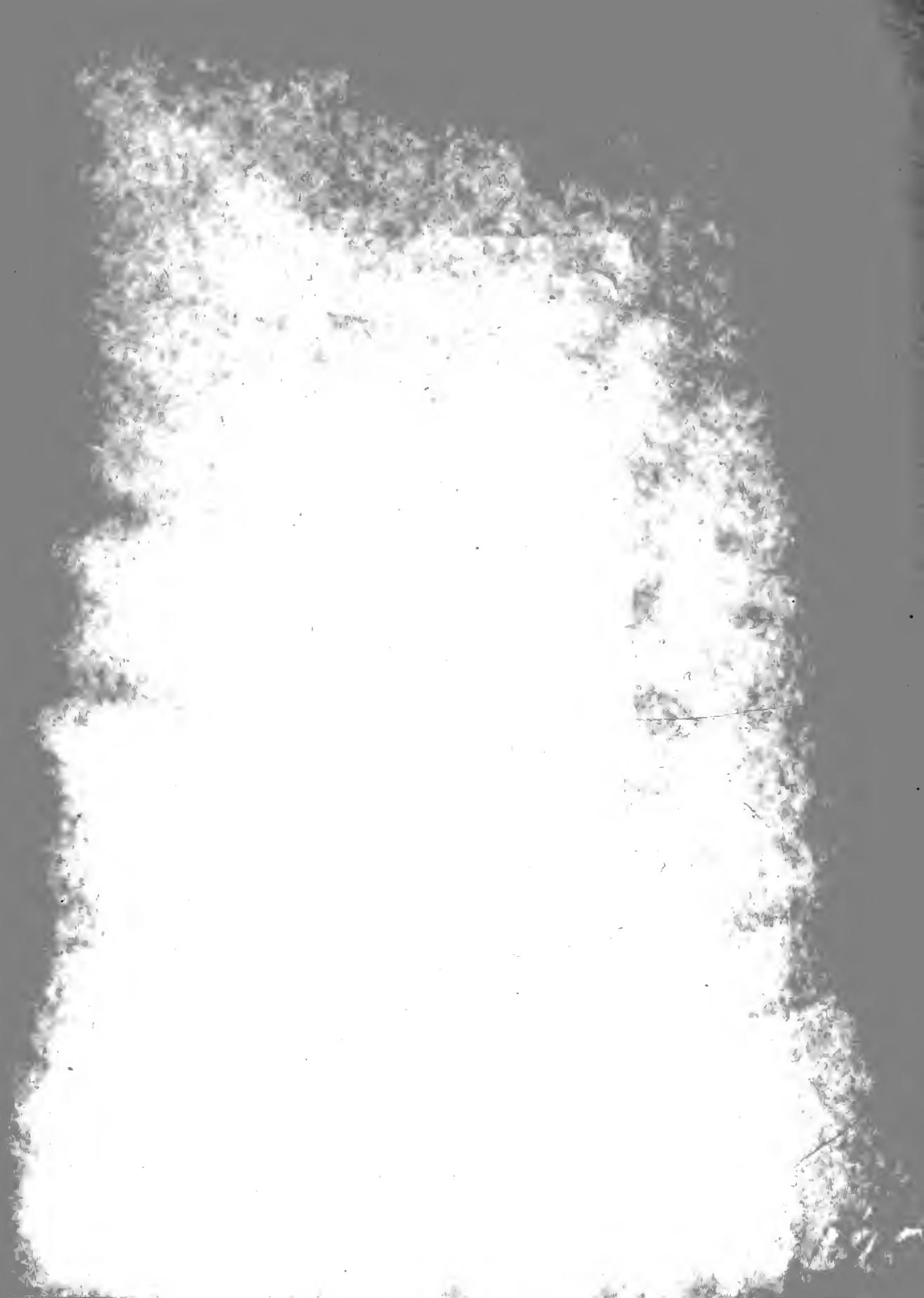
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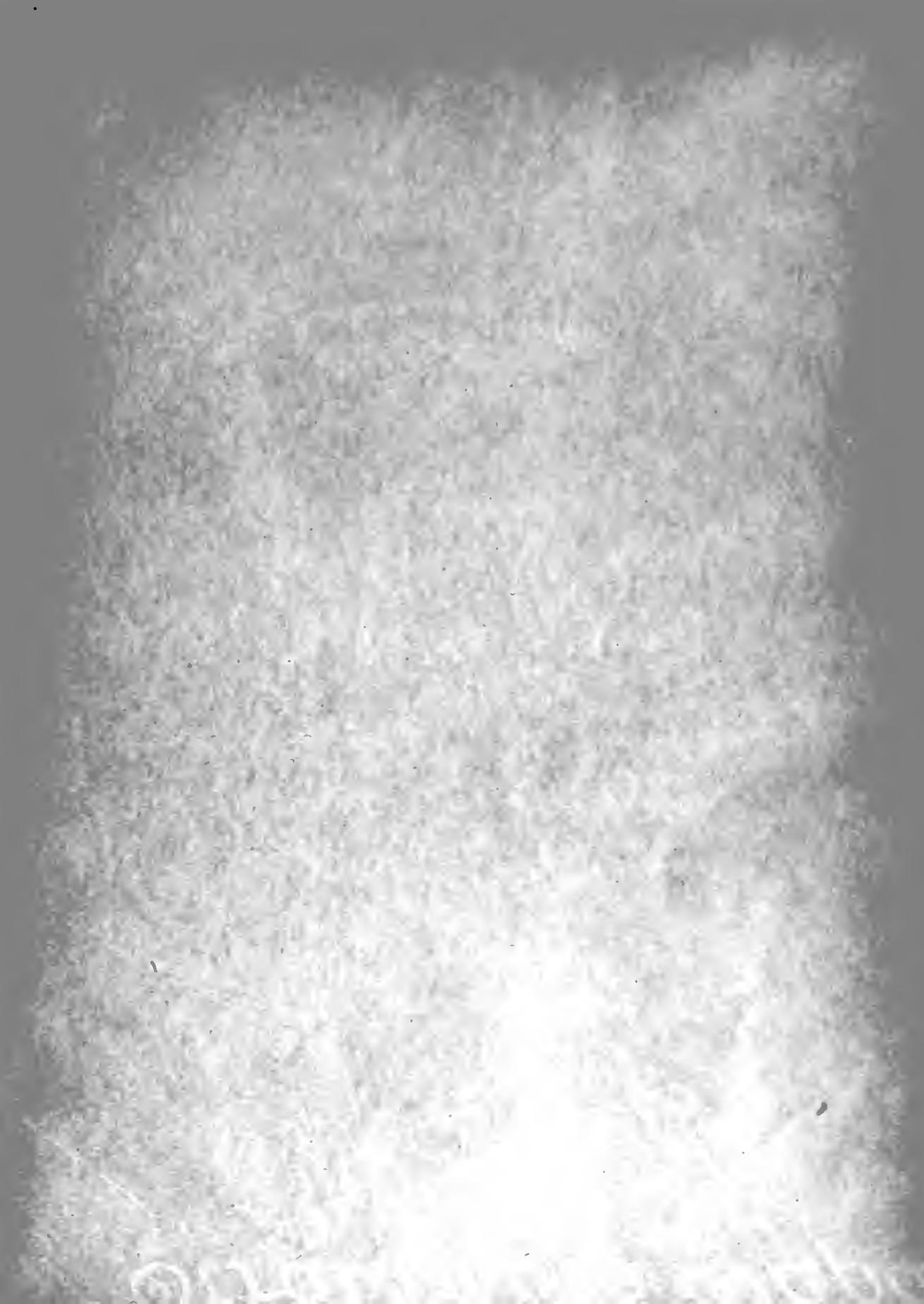
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THE  
CLASSICS OF INTERNATIONAL LAW

EDITED BY

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De Jure et Officiis Bellicis et Disciplina Militari Libri III

BY BALTHAZAR AYALA

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- VOL. I. Reproduction of the First Edition, with Introduction  
by John Westlake.
- VOL. II. Translation of the Text, by John Pawley Bate, with  
Translator's Note and Index of Citations.

THE LORD BALTIMORE PRESS  
BALTIMORE

**BALTHAZA-**  
**RIS AYALÆ, I. C. ET**  
**EXERCITVS REGII APVD**  
**BELGAS SVPREMI IVRIDICI,**  
**DE IVRE ET OFFICIIS BEL-**  
**LICIS ET DISCIPLINA MILITARI,**  
**LIBRI III.**

*Non in multitudine exercitus victoria belli;  
sed de calo fortitudo est. 1. Mach. 3.*



**D V A C I,**  
**Ex officina Ioannis Bogardi Typogr.**  
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CALIFORNIA

TO VINE  
ABSTRACT

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1582

# Three Books

## On the Law of War And on the Duties Connected with War And on Military Discipline

BY  
BALTHAZAR AYALA  
*Jurisconsult and Judge Advocate General of the Royal Army in the Low Countries*

“For the victory of battle standeth not in  
the multitude of an host; but strength  
cometh from heaven.” I. Mach. 3

Douay, from the business-house of John Bogardus, licensed printer,  
at the Sign of the Golden Books, in the year 1582

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VOLUME TWO

THE TRANSLATION

BY JOHN PAWLEY BATE, LL. D.  
*Reader of Roman and International Law in the Inns of Court, London*



WASHINGTON, D. C.  
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1912



## TABLE OF CONTENTS

### VOLUME I.

|                                                                                                                                                 | pages   |
|-------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| 1. Preface, by General Editor.....                                                                                                              | 3a-4a   |
| 2. Introduction, by John Westlake.....                                                                                                          | i-xxvii |
| 3. Epistola Dedicatoria, Praefatio de Jure Belli, Enumeratio Capitum,<br>and de Jure et Officiis Bellicis et Disciplina Militari Libri III .... | 1-226   |
| 4. Note on Corrections of the Text and Errors in the Marginal<br>References.....                                                                | 227     |

The text here reproduced was photographed from a copy of the original edition of 1582, belonging to the library at All Souls College, Oxford, and loaned to the University Press for the purpose of photographing.

The portrait of Ayala given in this volume has been reproduced by photography from one found in a volume of portraits of Belgian authors, published at Antwerp in 1608, with the title *Illustrium Galliae Belgicae Scriptorum Icones et Elogia: ex Musaeo Auberti Mirae Canonici Antwerp.*

### VOLUME II.

|                                                                                                                                                                                   | pages           |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1. Translator's Note on Corrections of the Text, Errors in the Marginal<br>References and Mode of Citation adopted in the Translation;<br>and classified List of Authorities..... | 7a-10a          |
| 2. Translation of Epistola Dedicatoria, Praefatio de Jure Belli, Enumeratio<br>Capitum, and de Jure et Officiis Bellicis et Disciplina<br>Militari Libri III.....                 | i-xii and 3-246 |
| 3. Index of Citations.....                                                                                                                                                        | 247-250         |



## TRANSLATOR'S NOTE.

### CORRECTIONS OF THE TEXT.

For the purposes of the translation the following corrections of the text as reproduced photographically in Vol. I have been adopted:

| Page                                                                        | Page                                                                                                                                                               |
|-----------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 13, l. 3 from bottom, <i>read sine. .sine</i><br><i>for siue. .siue.</i>    | 150a, l. 15, <i>read ager for agger.</i>                                                                                                                           |
| 52a, l. 15, <i>dele ab.</i>                                                 | 151, l. 6 from bottom, <i>read præbituri</i><br><i>for perituri.</i>                                                                                               |
| 53a, l. 7, <i>read debitori for creditori.</i>                              | 184a, l. 8, <i>read Macer for Marcianus.</i>                                                                                                                       |
| 65a, l. 7, <i>read inultum for multum.</i>                                  | 187, l. 30, <i>read Marcus for Decius.</i>                                                                                                                         |
| 65a, l. 11, <i>read fastigio for flagitio.</i>                              | 194a, l. 10, <i>read duces for duce.</i>                                                                                                                           |
| 71, l. 9, <i>read induciis for iudiciis.</i>                                | 210, l. 7 from bottom, <i>read Luceriam</i><br><i>for lucernam.</i>                                                                                                |
| 98a, ll. 14, 15, <i>read veritatem for a veri-</i><br><i>tate.</i>          | 211, l. 3 from bottom, <i>read dedecore for</i><br><i>decere.</i>                                                                                                  |
| 98a, l. 15, <i>read nimis for ius.</i>                                      | 215a, l. 8 from bottom, <i>read Taurome-</i><br><i>nianam for Tauritanam.</i>                                                                                      |
| 98a, l. 17, <i>read sine for siue.</i>                                      | 218a, l. 9, <i>read Schodram for Schoram.</i>                                                                                                                      |
| 109, l. 12, <i>read mihi for tibi.</i>                                      | 226, l. 11 from bottom, <i>read pares for</i><br><i>partes.</i>                                                                                                    |
| 131, l. 14, <i>insert iniusta before pœna.</i>                              | [Note also, p. 4, l. 9, the usual reading<br>is <i>oratores</i> , not <i>oratorum</i> . And,<br>query, p. 146, l. 4, read <i>coortos</i> for<br><i>cohortes</i> ?] |
| 133a, ll. 19 and last, <i>read Lavinii for</i><br><i>Lanuvini.</i>          |                                                                                                                                                                    |
| 136a, l. 2 from bottom, <i>insert non be-</i><br><i>fore concedentibus.</i> |                                                                                                                                                                    |
| 144, l. 12, <i>insert plena before ciuium.</i>                              |                                                                                                                                                                    |
| 146a, l. 20, <i>read exanimarentur for ex-</i><br><i>aminarentur.</i>       |                                                                                                                                                                    |

### ERRORS IN THE MARGINAL REFERENCES.

These are not uncommon, and the second edition—which was published at Antwerp in 1597, therefore after Ayala's death—gives very little help in detecting them. The most usual error is in a number, say of a Book of Livy or of a *Causa* in the Decretum: sometimes a passage is assigned by mistake to the Digest instead of to the Code: sometimes a small but disconcerting slip is made in the name of a Title in the Digest or the Code (thus *de non fœn.* is given for *de nautico fœn.*).

It is not proposed to give a list of such errors as have been found: instead, the translator has corrected them in the margin of the translation. In the few cases where he remains baffled (whether by an error or by an obscurity) he has printed the reference as it stands in the original (see, e. g., note *a*, p. 100a, vol. 1, and note *a*, p. 219, vol. 1).

### MODE OF CITATION OF BIBLE, AND OF THE BOOKS OF THE CIVIL, CANON, FEUDAL, AND IMPERIAL LAWS.

(1) The names of books in the Bible are given as in the English "Authorised Version": thus, where Ayala cites 1 or 3 Kings (*Regum*), the translation cites 1 Sam. and 1 Kings respectively.

## Translator's Note.

(2) Passages in the law-books of Justinian, or the Canon Law, or the Feudal or Imperial Law, are cited (wherever possible) by *number* of Book, Title and Section, and not (as in Ayala) by the name or opening words thereof: the former method is not only the method employed in the United States and Great Britain, but is also shorter than the latter method.\*

The references which Ayala makes to the Authenticæ are of two kinds. In the one case they are to passages in the Novels: these are given in the margin of the translation by the number of the Novel. In the other case the reference is to one of those summaries of an Imperial Constitution, or Novel, which used to be appended, in manuscript and early printed editions, to the part of the Code affected by the Novel in question, but which are omitted, as being unofficial, in modern editions. In the margin of the translation the reference to the Code is given, for use with one of the earlier editions mentioned, and the number of the passage in the Novel which is summarised is added, for use with a more modern edition. [In note *a*, p. 31*a*, vol. 1, is an instance of each of these kinds of reference.]

(3) More particularly, as to the citations from the Canon and the later Imperial Law:

A reference made by *Distinctio* and *Caput* (thus, c. 8, Dist. 35) is to the first part of the *Decretum*: references to the second part of the *Decretum* give, first, the *Caput* (c.), then the *Causa* (C.) and lastly the *quæstio* (thus, c. 29, C. 17, qu. 4): the third part of the *Decretum* is indicated by the words *De Consecratione* (thus, the only reference to this part—see p. 131—is as follows, c. 26, Dist. 5, de consecr.).

The *Decretals* of Pope Gregory IX are indicated by the letter X (for *Extra Decretum*): thus, c. 7, X. 5. 27 means caput 7 in Bk. 5, Tit. 27 of the *Decretals* of Pope Gregory IX. In order to distinguish the references to the *Liber Sextus* of the *Decretals*, "in vi" (that is, *in sexto*) is used: thus, c. 1, Bk. 5, Tit. 1 in vi means caput 1 of Bk. 5, Tit. 1 in "*Liber Sextus*." References to that subdivision of the second part of the Canon Law which is called *Liber Clementinarum* are given in the following form: c. 2, in Clem. ii. 11. This stands for caput 2 of Book ii, Tit. 11, in *Clementinis*.

Ayala uses the abbreviation  $\bar{x}$  in three distinct senses, first, to indicate any part of the Canon Law outside the *Decretum*, i. e., *extra Decretum* (see p. 61, vol. 1, note *e*, where the reference is to the *Decretals*)—these cases are among those dealt with in the preceding paragraph; sec-

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\* The following illustrations (from vol. ii, p. 12) will show how subdivisions of a Title are cited. "Dig. 49, 15, 19, 2" means Digest, Bk. 49, Tit. 15, Lex 19, section 2. "Dig. 39, 5:2 (7) and 3" means Digest, Bk. 39, Tit. 5, Lex 2, section 7, and Lex 3. Citations in the same note from different Books of the Digest are separated by a semi-colon. "pr."—see *e. g.* p. 22—stands for *principium* and indicates the opening section of a Lex.

The references to the *Institutes*, *Digest*, and *Code* are given as in Mommsen's edition; he references to the *Novels* as in the edition of Schoell and Kroll.

In the case of the Feudal Law the references are to the edition of Gothofredus.

### Translator's Note.

ond, to indicate Papal Extravagantes (see p. 18*a*, note *c*, where the reference is to the Extravagantes communes); and third, to indicate Imperial Extravagantes (see p. 8, note *g*, where the reference is to a constitution of the Emperor Hen. VII). In the latter two of these cases, that is, where the reference is to the Extravagantes, Papal or Imperial, the abbreviation Extrav. is used in the margin of the translation.

#### CLASSIFIED LIST OF AUTHORITIES CITED.

In addition to the works just named Ayala cites the poets Ovid, Vergil, Horace, Propertius, Lucan and Ennius.

Also the following historians, philosophers or grammarians: Aristotle, Plato, Æschines, Euripides, Demosthenes, Cæsar, Livy, Cato, Cicero, Dionysius of Halicarnassus, Cinna, Sallust, Tacitus, Xenophon, Plutarch, Suetonius, Cornificius, Appian, Valerius Maximus, Florus, Quintilian, Quintus Curtius, Aulus Gellius, Pliny the elder, Pliny the younger, Ælius Lampridius, Polybius, Dio Cassius, Diodorus Siculus and Nonius Marcellus.

Also, Christian Fathers and later historians: St. Cyprian, St. Ambrose, St. Augustine, Lactantius, Sozomen, Cassiodorus, Orosius, Eusebius and Procopius.

Of writers nearer his own time Ayala cites: Thomas Aquinas, Ferrandus Diaconus, Nicephorus, Froissart, Alexander ab Alexandro, Ant. de Herrera y Tordesillas, Petr. Crinitus, Ludov. Coelius Rhodiginus, Alfonso of Castile, Hotman, Bernard de Girard, Bodin, Egnatius (Egnazio), Hieron. Gratianus (Grazio) and Petrinus Bellus. Also from books on Numismatics by Covarruvias and Hadr. Jun. Hornanus. And from the Royal Ordinances of Spain and from Decisions of Church Councils. And also the jurists or canonists in the following list\*:

Abbas, see Panormitanus.  
Accurtius, 13th Cent., of Florence.  
de Adflictis, Matth., 15th-16th Cent.,  
Naples  
Albertus Brixensis (of Brescia), 14th  
Cent.  
Alciatus, 16th Cent., Milan.  
Alexander, see Tartagnus.  
Alvarus: Pelagius, 14th Cent., Span.  
de Anania, Joh., 15th Cent., Bologna.  
de Ancharano, Petr., 14th-15th Cent.,  
Bologna.  
Andreae, Joh., 14th Cent., Florence.  
Angelus, or Aretinus (of Arezzo),  
15th Cent.  
Baldus de Ubaldis, Perugia, 14th Cent.

Bartolus of Sasso Ferrato, 14th Cent.  
de Bellapertica or Belleperche, Petr.,  
13th-14th Cent., Burgundy.  
Bellovensis (of Beauvais), Vincent,  
13th Cent. (cited as Vinc.).  
Boerius (Boyer), 16th Cent., France.  
† Bonaud de Sauset, Jac., 15th-16th  
Cent., France.  
Brixensis, see Albertus.  
Budæus (Budé), Gul., 15th-16th Cent.,  
France.  
de Butrio, Ant., 14th Cent., Bologna.  
Cagnolus, Hieron., 16th Cent., Padua.  
‡ de Canibus, Joh. Jac., 15th Cent.,  
Padua.

\* In several of these cases Ayala does not directly cite the writer, but merely names him, on the authority of some other named writer, as holding the opinion in question.

† "Borrandus" in margin p. 100*a* is a misprint: Bonaud is meant.

‡ "Camb." in margin p. 31*a* is a misprint for Canib.

*Translator's Note.*

- Cantiuncula, Claude, 16th Cent., Alsace.
- Card. is abbreviation for Cardinal a Turre Cremata (i. e., Torquemada), 15th Cent., Span.
- de Castro, Paulus, 15th Cent., Naples.
- Chassaneo, Bartol., 16th Cent., France, cited as Chas. (?) and as Cas.
- Cinus, or Cynus, 14th Cent., Pistoia.
- Clarus, Julius, 16th Cent., Milan.
- Connanus,\* Francisc., 16th Cent., France.
- Corasius (de Coras), 16th Cent., Toulouse.
- Corneus, Pet. Phil., 15th Cent., Perugia.
- Corsetti (or Corsecti), Ant., 15th-16th Cent., Sicily, etc.
- de Covarruvias, 16th Cent., Span.
- de Crema, Francisc., 15th Cent.
- de Cuneo, or de Cugno, Gul., 16th Cent.
- Curtius or Corte (Senior †), 15th Cent., Pavia.
- Curtius or Corte (Junior †), Francisc., 15th-16th Cent., Pavia.
- Curtius or Corte, Rochus, 15th-16th Cent., Pavia.
- Decius, Philip, 15th-16th Cent., Pavia.
- Domin., see de Soto.
- Duarenus (François le Douaren), 16th Cent., France.
- Durandus, Gul., 13th Cent., France: cited by nickname of Speculator.
- Faber, Joannes, 16th Cent., Mechlin.
- Felinus, or Sandei of Felino near Reggio, 15th Cent.
- Fortunatus, Marcel., 16th Cent., Ital. Franc., see Victoria.
- Fulgosius (Fregoso), 15th Cent., Piacenza.
- de Imola, Joh., 15th Cent., Bologna.
- Jason, Mainus., 15th Cent., Ital.
- Laudensis (of Lodi), Mart., 14th Cent., Ital.
- Molinæus (Dumoulin), Chas., 16th Cent., Paris.
- Mysinger a Frundeck, Joach., 16th Cent., Stuttgart.
- Natta, of Asti, 15th Cent., Ital.
- Oldradus de Ponte, 14th Cent., Ital.
- Omphalius, Jacob, 16th Cent., Cologne.
- Panormitanus (of Palermo), Nich. de Tedeschis, 16th Cent. Also cited as Abbas.
- Papae, or de la Pape, Guido, 15th Cent., France.
- Paponius, Joh. (or Papon), 16th Cent., France.
- Præpositi (or Desparborde), Gul., 14th Cent., Span.
- Pyrrhus Englebermæus, 16th Cent., Orleans.
- de Rauen (Ravanus), 13th Cent., Lorraine.
- Ripa, Joh. Francesc., 16th Cent., Pavia.
- Romanus, Ludovic., 15th Cent., Ital.
- de Rosate (of Roxiati, near Bergamo), Albericus, 14th Cent.
- Salicetus, either Rich., 14th Cent., or Bartol., 14th-15th Cent., both of Bologna.
- de Silvestris, Vergilius, 16th Cent., Ital.
- Socinus, Bartol., 15th Cent., Siena, son of the elder Marian. Soc.
- Socinus, Laelius Francisc. Maria, 16th Cent., Siena, nephew of preceding.
- de Soto, Dominicus, 16th Cent., Spain: sometimes cited as Domin.
- Speculator, see Durandus.
- Tartagnus (de Tartagnis), Alexander, 15th Cent., Ital.
- Tiraquellus (Tiraqueau), 16th Cent., France.
- de Valle (or a Val.), Roland, 16th Cent., Ital.
- Vasquius (Vasquez), Fernandus, 16th Cent., Span.
- Verrutius, Hieron., 16th Cent., Groningen.
- de Victoria, Francisc., 16th Cent., Span. Vinc.; see Bellovensis.
- Zasius, 16th Cent., Freiburg in Breisgau.
- Zoannettus, Francisc., 16th Cent., Bologna.

\* Cited in original, p. 75a, as Conan.

† Curt. Inn. is sometimes misprinted for Curt. jun. and Curt. Sent. for Curt. sen.

*To the most serene Prince of Parma and Piacenza,*

*Alexander Farnese,*

*Lieutenant-Governor and most successful Captain-general  
for the King in the Low Countries,*

*Balthazar Ayala, jurisconsult, greeting:*

Publicists maintain, Most Serene Prince, that the habit of referring our actions and laws and legislation to the standards of our forefathers and of their institutions conduces very materially to the welfare and preservation of the State; for it is with the State as it is with some celebrated picture which is fading with age, if we omit to renew its original coloring it will keep neither beauty nor outline; and just as in the human body so, too, in the State, every day there is something developed which calls for treatment; and outworn laws breed vices such as the State can not tolerate for any length of time. Hence Ennius' line:

*Moribus antiquis res stat Romana, virisque.*

(On old custom the fortunes of Rome are based and on her manhood.)

a line which in its terseness and truth Cicero thought worthy of the oracle. For (says he) had not the State been stayed as it was by customary rules, its men would not have availed to found or perpetuate so vast and beneficent an empire, nor would these customary rules have sufficed had not men of such a type been at the head of the State.

In his book on  
The Republic.

Ancestral observance of custom, then, begat fine men and they in their turn were tenacious of the customs and customary institutions which had descended to them from their fathers. This is the reason why the Roman State grew and endured. For (as Sallust says) empire is easily preserved by the same means by which it was at the outset gained, but, if sloth usurp the place of industry, if lust and pride usurp the place of self-restraint and fair-dealing, then a change of fortune at once accompanies this change of character.

It was this that Apollo is taken to have meant by his reply on the occasion of his being asked to say when, at last, the end would come of the ills and dissensions by which Greece was so sorely troubled. The oracle's reply was that the troubles of Greece would end when the Greeks had doubled the god's altar at Delos. Now this altar was cubical in form; so the Greeks thought they could easily fulfil the condition, by adding a second mass equal in bulk to the existing one. They did not, however, obtain thereby any diminution of their ills and the same god gave them to understand that the condition imposed by the oracle had not been duly satisfied.

At last, under the teaching of Plato and other philosophers, they came to understand that what the oracle of Apollo had required was not the matching of a new bulk with an old one, but the adoption of such new measures and principles as were conformable to the old ones (*analogiam cum analogia et rationem cum ratione componendam*); and thus when, owing to the far-seeing counsel of men of wisdom, matters had been adjusted to the standards of olden times and harmonized with the institutions of their forebears, and everything was put back into its proper place, the evil began to abate and the well-being of days of yore began to return.

Odes, bk. 3, ode 6.

The same sentiment inspired Horace, when he perceived what disasters the neglect of religious observance had brought in its train, to address to the Romans the lines,

Delicta maiorum immeritus lues,  
Romane, donec templa refeceris,  
Aedeisque labentis deorum et  
Fæda nigro simulacra fumo.

(O Roman, you, though guiltless, will expiate the offenses of your forefathers, until you have repaired the temples and falling shrines of the gods and the statues sullied with blackening smoke.)

In these lines Horace shows how far the Romans had fallen below their ancestors through violating religious duty and neglecting the ancient rule. And we have a notable instance of this in Roman history, clearly set out by Livy, where he tells us how corruption of Roman morals, neglect of divine worship, and violation of the law of nations were followed by the capture and

almost total destruction of the city by the Gauls. The valor of Camillus, however, restored to the city its liberty, and this was followed by the restoration of divine worship, by the revival of ancestral laws and institutions, and by the punishment of those who had violated the law of nations; the result was that the city throve wondrously, gaining in time the empire of the whole earth, and there was truth in the epigram that the city of Rome would long ago have been on the edge of ruin if it had not been ruined; at any rate it would never have reached such an eminence.

It is our hope, Most Serene Prince, that in similar fashion your surpassing valor and wonderful skill and foresight in affairs may lead to the restoration of the worship of the true God and to the reestablishment of the sovereign authority of the king (due to him both by divine and human law), and that so the subversion of all things human and divine which has been brought into the Low Countries may by God's aid be checked and at last ended, and that the whole of the Low Countries may be restored to their former happy state. Of which country may be said what our sacred books say of the Israelites:

*Judith, ch. 5.*

“Whatsoever place they went up against, their God fought for them, without their bow and arrow and without their shield and sword, and he conquered: nor was there any to mock at that people save when they forsook the worship of the Lord their God. But as often as they worshipped any other god than Him, they were given for a spoil and to the sword and to reproach.”

Further, the expediency of frequently revising the laws and enactments of ordinary civil society and of shaping them to the model of old institutions is admitted; and this led the early Romans to appoint censors whose duty was to scrutinize the morals of the citizens (liable, as they are, so easily to become corrupt if neglected) and in that way to preserve the old-time seemliness and uprightness of behavior. But in war, assuredly, this process is especially fitting, seeing that military discipline requires a rough and sharp kind of punishment. For, as Valerius Maximus observes, armed forces are the repository of strength and if these be once put on the wrong path, they will crush unless they are

crushed. So much, indeed, depends on military discipline that merely according as it is maintained or neglected, so have decisive defeats been inflicted or sustained, many armies been overwhelmed or preserved, vast empires (in a word) been gained or ruined, as we shall show at greater length in the course of this book.

Now the Romans (who claimed Mars as ancestor both for themselves and for their founder) reached the height of their military glory entirely by dint of military discipline—which Valerius Maximus calls the especial adornment and buttress of the Roman Empire; but when this discipline slackened they were gradually involved in more and more disasters until the day came when they had lost, together with the valor of their ancestors, both empire and glory. Accordingly I have thought it a work worth doing, so far as my legal studies and historical reading enabled me, to describe how so great military glory was earned, as regards the men and methods employed and the kind of discipline resorted to. The result will show that men's qualities are the same now as formerly and that the chances and occurrences which befall us from day to day are the same as befell men formerly; so that it will not be difficult for one who ponders with diligence on things of old and examines them with judicial deliberation to employ the past—appropriate task for a wise man—in judging the present, in foretelling the future, and in educing from old examples remedies fit (because of the similarity of the circumstances) for modern ills.

These are matters the neglect of which more often than not may cause us to stumble over the same stone. For (as Aristides used to say) big things are achieved in war not so much by arms as by prudence and planning. Accordingly, Xerxes, whose forces earth and sea could scarce contain, was beaten by the assiduity of a single individual, Themistocles. The Romans, too, did not possess greater or stronger forces than did the vast kingdoms and savage barbarians encountered by them, but the sternness of their moral usages and their military system gave them the upper hand. It was for this reason that Agamemnon did not desire to have ten men like Ajax, but like Nestor and Ulysses,

never doubting that their counsel and prudence would bring about the speedy overthrow of Troy. And Sallust tells us how there was a long-standing controversy as to whether bodily strength or mental qualities contributed the more to military success, but later, in times of danger and difficulty, it was realized that powers of mind were the most effective in war. In Cicero, Acad. quest., bk. 2. indeed, we read that when Lucullus started from Rome for the Mithridatic war he was admittedly ignorant of military matters, but by reading about campaigns, and by his industry and native wit, he became so proficient a commander, in every species of warfare, that Mithridates, the greatest king after Alexander, declared that in his judgment Lucullus was to be ranked above all the generals whom he had read about.

It was, therefore, a sage reply that Alfonso, King of Aragon, made to the question whether he owed more to arms or to books: he said that he had learned from books both arms and the laws of arms, thus proclaiming to the world that he owed everything to learning. And the remark of the Emperor Justinian tends in the same direction, namely, that on the one hand military affairs have been carried through in safety by means of law and that on the other hand law has been preserved under the protection of arms, each always requiring the help of the other. In short, it is incontrovertible that no State, however flourishing, can find any degree of safety in arms without law and discipline any more than in law without arms. Constit. confirming the Code, Sec. 1.

And so, Most Serene Prince, I feel assured that this work of mine, such as it is, will not be displeasing to your Highness. The offering is, of a truth, a poor one and unworthy of your splendor, but (unless I err) it is opportune to the present crisis; and I would that, in appraising my work, my perhaps overexacting and severe critics may bear in mind what Quintus Fabius Maximus said to his son, Quintus Fabius Maximus the consul, namely, that the same standard ought not to be applied in the midst of the heat of war as in the tranquillity of peace, for much that in quiet times is visited with correction and punishment is pardonable in times of mobs and the sword.

Most Serene Prince, I have dedicated to your Highness whatever study and toil there is here, both because I desired, in

my own interests, that your Highness should have the means of knowing how and with what studies I have occupied the leisure left me by my public duties, and also because I thought that no one would be more interested in these military topics than a general so great and an enthusiast for military discipline so keen as yourself.

May God, most good and most mighty, guide your movements and preserve you to us to the most distant day.

*From the camp before Tournai, 31 Oct. 1581.*

## A PREFACE CONCERNING THE LAW OF WAR.

It is commonly thought a fine saying of Pindar that war is a tyrant and a mistress, lording it over all law, there being nothing so opposed to God's gift of law as force, which is a characteristic of the beasts. Just as the eagle is endowed with sharpness of talon and the lion with savagery of tooth, so man with reason (which jurists correctly style the soul of law) ; and this should be his only weapon and defense. Now, although a State can not be carried on without justice and although nothing is so subversive of the State as injustice (as was decisively shown by Lælius in the dialogue which Cicero, in his *Republic*, represents him as holding with Philo), yet it is to-day a fixed idea with many that war can not be waged without violation of right, for the ills that inevitably spring from wars, even from those that are classed as just, are so many and great and fearful and cruel that any one who would propose to apply to all of them the test of justice is simply blending reason with raving. For, it was on the propositions that in war there is no scope at all for justice and that that is right in war which is expedient to the stronger (might supplanting right), that men of old used especially to rely in order to prove that it was unjust and contrary to nature for men to be enslaved by their conquerors, this being an institution derived from the law of war—while they admitted, however, that this was a kind of injustice which every far-spreading empire must adopt as essential to the administration of its provinces.

The opinion in question must, however, be unhesitatingly repudiated. There are laws of war just as much as of peace. The use of force against those who will not submit to fair demands or will not be restrained by reason is not an injustice. For (as St. Augustine says) On the Kingdom of God, bk. 19, ch. 7. the wickedness of the enemy convinces the wise man that the prosecution of "just" wars is not only right but also a necessity. Accordingly, David, a man after God's own heart, and other very holy men have made war; and God himself c. 3, C. 23, qu. 1. ordered the Jews to make war on the Amorites and other peoples.

A wise man, therefore, will grieve to have to admit that the Deut. 2. necessity for a just war has arisen, but he will embark on it, plac-

ing the common weal before the interests of individuals lest, unmindful of the well-known dictum of Plato, he should abandon the body of the State as a whole through his wish to protect some given part thereof. Nor is it without more to be assumed unjust that the conquered in a just war should formerly have been taken into slavery. Nay, the justice of this can be defended on the ground of the expediency to the State of punishing those who wage unjust war; and it may also be urged that slavery is a blessing to such wrong-doers, for the opportunity of further wrongdoing is taken away from them and they will behave better under restraint than as their own masters. Agesilaus was wont to characterize the Asiatics as follows: "Good in slavery, bad in freedom."

Plutarch's  
Apophthegms.

Kingdom of God,  
bk. 19, ch. 7.

Numb. 31.

Ephes., ch. 6.

And as a support to this reasoning, Lælius, in the course of the argument in Cicero's *Republic*, furnished the following noble analogy, taken as it were from nature: "Why, then, does God govern man, the soul govern the body, reason govern the passions and the other vicious parts of the soul?" St. Augustine was particularly struck with this. Moses, too, in obedience to the command of God, after the defeat of the Midianites, divided all the spoil, both man and beast, among his own men. And the Apostle admonishes slaves to be obedient to their masters and to serve them in singleness of heart. Right reason, therefore, implanted by nature in wise men, has inculcated this, that human depravity may be restrained by war, by captivity, and by slavery—on which topic we shall enlarge elsewhere.

✓ Further, the same principle of justice which lays down rules of war, imposes its laws on soldiers and armies, whereby military discipline is secured: \* "If this be once impaired" [I borrow the words of the dictator Papirius as recorded by Livy] "neither the soldier would obey the centurion's commandment nor the centurion the tribune's, nor the tribune the legate's, nor the legate the consul's, nor the master of the horse the dictator's, while no edicts of the commander would be observed; but without leave the soldiers would wander and rogue, either in their own or on enemy's land, unmindful of their oath, and discharge themselves from soldiery through a licentious liberty of their own, whenso-

\* Here and in other speeches taken from Livy, the translation by Philemon Holland (London A. D. 1600) has been followed, with some modifications. [Tr.]

ever they listed, leaving their ensigns and colors not attended, not meeting at summons; nor making any difference whether they skirmish by day or night, on even ground or uneven, with vantage or disadvantage, with direction of captain or without; observing no signals or watchword, no array. In sum, the whole course of military service would henceforth be blind, rash, and inconsiderate, after the guise of robbing, to stand and go current for solemn and sacred warfare."

For just as in string-music and in part-singing different sounds and unlike notes are blended into an accordant harmony, so it may be said of an army (as Scipio in the discussion in Cicero's *Republic* was made to say of the State) that its concerted activities are produced by the coöperation of the most unlike individuals, it being compacted into one by means of reason and discipline out of the intermingled ranks of upper, middle, and lower. And what musicians style harmony in the case of song is in the case of an army concord, that closest and most efficient bond of military discipline. Now this can not exist apart from justice, which is needed for every undertaking and which possesses such power that (in Cicero's words) not even those who batten on wrongdoing and crime can live without some spark of it.

Let this suffice to explain the motive of this work and to placate those who have ventured to condemn the laws of war (with which the safety of the State is implicated) as being contrary to nature and the peace of the Gospel.



## TITLES OF CHAPTERS.

|                                                                                                                                                                                                                                     | Pages of<br>original. | Pages of<br>translation. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|--------------------------|
| <i>The chapters of the First Book:</i>                                                                                                                                                                                              |                       |                          |
| 1. Of the method of declaring war and of other ceremonies relating to war which anciently were regulated by feacial law.....                                                                                                        | 1-4b                  | 3-6                      |
| 2. Of just war and just causes of war.....                                                                                                                                                                                          | 4b-24 bis.            | 7-25                     |
| 3. Of the duel or single combat.....                                                                                                                                                                                                | 24 bis.-29            | 26-30                    |
| 4. Of hostage-seizing, commonly called reprisals.....                                                                                                                                                                               | 29-32a                | 31-33                    |
| 5. Of capture in war and the law of postliminy.....                                                                                                                                                                                 | 32a-54a               | 34-54                    |
| 6. Of keeping faith with an enemy.....                                                                                                                                                                                              | 54a-73a               | 55-72                    |
| 7. Of treaties and truces.....                                                                                                                                                                                                      | 73a-84                | 73-83                    |
| 8. Of trickeries and deceit in war.....                                                                                                                                                                                             | 84-87                 | 84-87                    |
| 9. Of the law of ambassadors.....                                                                                                                                                                                                   | 87a-91                | 88-92                    |
| <i>The chapters of the Second Book:</i>                                                                                                                                                                                             |                       |                          |
| 1. Of the duties relating to war.....                                                                                                                                                                                               | 92-105a               | 95-108                   |
| 2. Of the commander or general of an army.....                                                                                                                                                                                      | 105a-121a             | 109-124                  |
| 3. There should be one head of an army and not more; with full power; and permanently appointed; and not a man who has previously been reprimanded or disgraced.....                                                                | 122-125               | 125-128                  |
| 4. Whether gentleness and kindness or sternness and cruelty are the more advantageous in a general.....                                                                                                                             | 125-129               | 129-132                  |
| 5. Times and seasons to be taken into account above all in war....                                                                                                                                                                  | 129-132a              | 133-136                  |
| 6. Factions and prolonged deliberations on matters of war are very harmful, especially when what is wanted is action rather than counsel .....                                                                                      | 133-135a              | 137-139                  |
| 7. So long as their strength remains unbroken, the King and State should not admit the slightest derogation from their sovereignty: and those err who think that the pride of an enemy can be tamed by moderation and patience..... | 135a-139              | 140-143                  |
| 8. Whether it is better to await war at home or to carry it into the enemy's territory .....                                                                                                                                        | 139-144a              | 144-149                  |
| 9. Whether it is better at the beginning of a battle to make for the enemy with much din and vehement charge or on the other hand to hold one's ground and await the enemy's attack.....                                            | 144a-147a             | 150-152                  |
| 10. It is not prudent to attack a state which is torn by civil dissension, merely in reliance on that fact.....                                                                                                                     | 147a-149a             | 153-155                  |
| 11. Troops to be so placed, by all possible endeavors, as that fighting is an absolute necessity for them, but the enemy should be afforded means of escaping that necessity.....                                                   | 149a-154              | 156-160                  |
| 12. In time of victory the first and chief thought must be about peace..                                                                                                                                                            | 154-156               | 161-162                  |
| 13. After enemies have been crushed, what is the best method for keeping them quiet in a lasting peace.....                                                                                                                         | 156-160               | 163-167                  |
| <i>The chapters of the Third Book:</i>                                                                                                                                                                                              |                       |                          |
| 1. Of military discipline.....                                                                                                                                                                                                      | 161-167               | 171-176                  |
| 2. Of the duties of tribune and legate and other officers.....                                                                                                                                                                      | 167-172               | 177-181                  |
| 3. Of quarter-masters .....                                                                                                                                                                                                         | 172-173               | 182-183                  |
| 4. Of soldiers and who can serve as such.....                                                                                                                                                                                       | 173-180               | 184-190                  |
| 5. Of the military oath.....                                                                                                                                                                                                        | 180-183               | 191-193                  |
| 6. Of discharge .....                                                                                                                                                                                                               | 183-185a              | 194-196                  |
| 7. Of the privileges of soldiers.....                                                                                                                                                                                               | 185a-193              | 197-204                  |
| 8. Of military courts.....                                                                                                                                                                                                          | 193a-194a             | 205-206                  |
| 9. Of the punishments of soldiers.....                                                                                                                                                                                              | 194-198a              | 207-210                  |

|                                                                                                                 | Pages of<br>original. | Pages of<br>translation. |
|-----------------------------------------------------------------------------------------------------------------|-----------------------|--------------------------|
| 10. Of the contumacious and those who disobey the orders of their officers and do not defend them.....          | 198a-200a             | 211-213                  |
| 11. Of truants .....                                                                                            | 200a-201a             | 214-215                  |
| 12. Of deserters .....                                                                                          | 202-203               | 216-217                  |
| 13. Of deserters to the enemy and traitors.....                                                                 | 203-206a              | 218-221                  |
| 14. Of the seditious.....                                                                                       | 206a-209a             | 222-225                  |
| 15. Of those who yield ground in battle or surrender when beaten...                                             | 209a-212              | 226-228                  |
| 16. Of those who part with their arms or lose them.....                                                         | 212-213a              | 229-230                  |
| 17. Of those who desert, or neglect, their watch.....                                                           | 213a-215a             | 231-232                  |
| 18. Of him who loses, or surrenders to the enemy, a fortress or town which he has been appointed to defend..... | 215-220a              | 233-238                  |
| 19. Of theft and certain other military offenses.....                                                           | 220a-221a             | 239-240                  |
| 20. Of soldiers' rewards.....                                                                                   | 221a-226a             | 241-245                  |

These three books are of use in the preservation of military discipline in these troublous times, and contain nothing contrary to the Catholic Faith. So I adjudge 16th Nov. 1581.

MATHIAS LAMBRECHT,  
Licentiate in Sacred Theology and Regius Professor of Divinity in the good University of Douai.

THE FIRST BOOK

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Of the Law and the Duties connected with War and  
on Military Discipline



## CHAPTER I.

### *Of the method of declaring war and of other ceremonies relating to war, which anciently were regulated by fecial law.*

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| <ol style="list-style-type: none"><li>1. Feacial law.</li><li>2. The college of feccials.</li><li>3. The duty of feccials.</li><li>4. Clarigatio (solemn demand of redress).</li><li>5. Pater patratus (the chief of the feccials).</li><li>6. The good-faith of the Tibarenians.</li><li>7. The words of the feacial law.</li></ol> | <ol style="list-style-type: none"><li>8. A treaty can not be made without ordinance by the people.</li><li>9. The surrender of Spurius Postumius to the enemy.</li><li>10. The formula of surrender.</li><li>11. The surrender of Mancinus to the Numantines.</li></ol> |
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How scrupulously the Romans considered what legal principles were applicable to each occasion, whether of peace or of war, may be learned from their historians; and it ought not to excite surprise that they were uniformly so successful in their wars, seeing that they never took up arms save on just grounds. Dionysius of Halicarnassus gives us Rom. Antiq., bk. 2. the following illustration of the extent to which they carried this principle.

The Campanians, in consequence of an utter defeat by the Samnites, had been compelled to beg help from Rome, and their envoys were introduced into the Senate and made long speeches, setting out the utility to the Romans of an alliance with the Campanians and craving a lasting friendship and present assistance. They did not, however, obtain more by this (owing to the Senate's unwillingness to be involved in the wars of other States) than an offer to despatch a Roman mission to the Samnites to beg that no violence should be done to the Campanians. To this offer the head of the Campanian delegation replied, in accordance with his instructions:

“ Even if you decline to intervene with lawful force for our protection against force and outrage, you will certainly defend what is your own. Accordingly, we hereby surrender into your sovereignty, O Conscript Fathers, and into that of the Roman people, the Campanian people, the town of Capua, our territory, and all our interests, both divine and human; so, whatever sufferings are inflicted upon us in the future will be inflicted on your subjects.”

Thereupon, so Livy narrates, the Senate, deeming it a matter of Bk. 7. honor not to abandon vassals, entered on a war with the Samnites and drew hostilities away from the Campanians and upon themselves—which they would never have done without good cause.

In like manner, before the third and last Punic War, that great undertaking was the subject of a long and detailed discussion, in the course of which widely different opinions were expressed by Marcus Porcius Cato and Scipio Nasica, leading men in the Senate, the former being reckoned the shrewdest man in the State and the latter having been adjudged, even by the Senate, the best of men. Cato urged a declaration of war against Carthage on the ground that she was keeping an army in readiness on her territory, ostensibly against King Massanissa, but in reality against Rome; Nasica took the opposite view and favored the despatch of a mission to Carthage which, while rebuking the Senate there for keeping on foot an army and naval stores in defiance of the treaty, might spy out what was being done. But Gisco, the son of Hamilcar and an obstreperous person, so worked on the Carthaginian Senate, by his advocacy of a war against Rome, that the envoys were fain to seek safety in flight. And, although Cato then protested against any further postponement of war, Nasica repeated that he could not yet find a just cause of war and that no rash steps should be taken. Cato's view, however, prevailed and war was begun with the Carthaginians on the ground of their maintaining a fleet in defiance of the treaty and of their having marched an army beyond their frontiers, and of their attack on Massanissa, an ally of Rome.

Flor., bk. 49.

[1] Now the preconditions of a just war were most scrupulously laid down by the feacial law of Rome, as Cicero tells; and, in accordance therewith, no war can be just unless preceded by a demand of satisfaction, and by due announcement and declaration.

Offic., bk. 1.

[2] And Ancus Martius, a king of the old stock, appointed this to the Æquians for a law, and it was from him (according to the testimony of Livy) that the Romans derived their ceremonial of war, pursuant to which it was not enough merely to wage war, but there must also be a formal declaration of war. Others, however, attribute this to Numa Pompilius, by whom, in the seventh part of his sacred laws, the feacial college (so they say) was founded.

Bk. 1.

Dion. Hal., Rom. Antiq., bk. 2.

[3, 4] The duty of the feacials, to whom the Romans conceded at all times the highest degree of authority, may be summed up as follows: To see to it that the Romans did not make an unjust war on any confederate State, and to take cognizance of wars, alliances, and treaties, and of wrongs done to allies and other confederate States, and, if any of these States was the first to infringe any condition of a treaty, to send envoys who should orally put forth their claim and demand redress with a loud [*clara*] voice (which is called *clarigatio*) in the following terms: "I call Jupiter to witness: if against duty and justice I demand this reparation for the Roman people and myself, mayest thou never allow

NOTE: The bracketed numbers at the beginning of paragraphs refer to the topical summary found at the commencement of each chapter.

me to return safely to my fatherland." Then, if this demand was refused, the bond of alliance and friendship (if any such existed) was first denounced and then, after a fixed lapse of thirty days, war was declared and redress obtained, under the laws of war, by means of captures and hostile ravage. In any case, should the *fecials* forbid or disapprove, neither Senate nor consul nor popular vote might decree arms against an enemy.

[5] Now the chief of the *fecials* was the one called *pater patratus* (he being a person who had children of his own, while his father was still living). A *fecial* crowned his head and brow with myrtle, and thus made him their chief for all purposes of declaring war and making treaties. Plut., Rom. Quest.

It must, further, be noticed that there was no need that the declaration of war should be made in person to the king against whom the war was to be waged, but it was enough to make it to any armed body of troops. This was laid down by the *fecials*, first on the occasion of declaring war against Philip, and a second time against Antiochus. After a correct declaration of war all peaceable intercourse was prohibited and the soldiery were free to take up arms, collect forces, lead them against the foe, make raids, drive booty, lay districts waste and ravage them with fire and sword, cutting down crops and burning buildings, and generally might act as an enemy does.

[6] It is indeed recorded that the *Tibarenians* carried punctiliousness to such a pitch that they would not engage in conflict with an enemy before sending to him by *fecials* an honorable declaration as to the day, place, and hour, which we read was also sometimes done by the old Romans. Livy, too, gives us the formula and most ancient ritual of declaring war. Bk. 1. And Gell., bk. 10, ch. 4. And Dion. Halic., Rom. Antiq., bk. 2.

The *fecials* also investigated any complaints that might be made of wrongful breach of treaty; and, if the charge was sustained, they had the offenders seized and delivered to the injured parties. They took cognizance also of all wrongs done to ambassadors, for these are inviolable by the law of nations (*jus gentium*); and, if violence were done to them by any people or nation, it was the *fecials'* duty to insist on the surrender of those wanton offenders against that law; and our law is the same. Dig. 50, 7, 18.

The *fecials*, too, saw to it that the terms of treaties were carried out. They made treaties of peace and, if one had been made without due regard to law, they declared it void. They had no power, however, to give sanction to a treaty made with an ally or with an enemy or to frame a compact save where either consul or *prætor* had given his authorization and after due approval by Senate and people. And, lastly, if generals or captains sinned in aught against the sanctity of an oath, the *fecials* took the matter up and made atonement.

[7, 8] Now these were the words of the fecial law: "Of war, peace, treaties, truces, envoys [*oratorum* \*] let the fequals be the judges." And indeed if any one entered into a treaty without the due forms, the fequals themselves would deliver him to the enemy, in order that the people might so be released from all obligation. Without a popular vote and the authorization of the Senate, nothing could be so ratified as to bind the commonwealth, and no treaty could be made without the fequals and the other solemn rites.

[9] Accordingly, when the consuls Titus Veturius and Spurius Postumius, after the defeat at Caudium, made peace with the Samnites without being empowered so to do by the people and Senate, on the terms of the Roman legions passing under the yoke, they were surrendered to the enemy in order that the peace might be repudiated, and Titus Numicius and Quintus Æmilius, tribunes of the people, were surrendered with them because they too had given their authorization to the treaty. It was indeed Postumius himself who initiated and counselled the surrender, using these words, as preserved by Livy: "Let us be surrendered by the fequals, naked and bound; let us free the people from any obligation wherewith we may have bound them; so that no obstacle may remain, either under divine or human law, to a just and pious war being entered on afresh."

[10] And this is the formula used by the fequals in making the surrender:

"Whereas these men, without warrant from the Roman commonwealth of Quirites, have pledged themselves that a treaty should be concluded and thereby have done a wrong, for that cause, with the intent that the Roman people may be quit of impious guilt, I surrender these men to you."

Cic., *Offic.*, bk. 3.  
Flor., bk. 2, ch. 18.

[11] In the same way, many years later, Caius Mancinus was surrendered to the Numantines for making a treaty with them without warrant from the people or authorization from the Senate.

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\* If this be changed to *oratores* (the usual reading), the translation will be, "Of war, . . . truces, let the fequals be the spokesmen and judges."

## CHAPTER II.

*Of just war and just causes of war.*

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| <ol style="list-style-type: none"> <li>1. The laws of war must be observed.</li> <li>2. Two kinds of conflict.</li> <li>3. The object of wars is to secure peaceful life.</li> <li>4. Many ills arise even out of just wars.</li> <li>5. An honorable war to be preferred to a disgraceful peace.</li> <li>6. Just wars permitted alike by the Law of Nations [<i>jus gentium</i>], the Canon Law and the Divine Law.</li> <li>7. The authorization of a sovereign required for a just war.</li> <li>8. Among the Romans the determination of questions of peace and war was in the hands of the people.</li> <li>9. War may sometimes be waged without the authorization of the prince.</li> <li>10. The penalties of rebellion are incurred by the fact itself [<i>ipso jure</i>].</li> <li>11. Just causes of war.</li> <li>12. Rebellion.</li> <li>13. An outrage on the prince is deemed an outrage offered to God.</li> <li>14. A rebel and an enemy quite different persons.</li> <li>15. Whether the laws of war apply to rebels.</li> <li>16. Civil discord.</li> <li>17. The law of Solon.</li> <li>18. In war not always safe to keep aloof from both sides.</li> <li>19. The middle course hazardous.</li> <li>20. The authority of the prince must always be supported against rebels.</li> </ol> | <ol style="list-style-type: none"> <li>21. There can not be a just cause for rebellion.</li> <li>22. The fatherland or State, what it is.</li> <li>23. Rebellion a most heinous offense.</li> <li>24. A tyrant may be killed.</li> <li>25. A lawful sovereign can not be dubbed tyrant.</li> <li>26. The <i>lex regia</i>.</li> <li>27. The Pope may deprive a king of his crown for cause.</li> <li>28. Whether a war against infidels is just, and how far.</li> <li>29. The emperor is not lord of the whole world.</li> <li>30. Just war waged on heretics.</li> <li>31. The soldier incurs no guilt even if the cause of war be unjust.</li> <li>32. A Christian soldier may take service under a pagan ruler.</li> <li>33. How far obedience is due to a pagan king.</li> <li>34. A war may be "just," even though the cause thereof be unjust.</li> <li>35. Whether a war can be "just" on both sides.</li> <li>36. Money the sinews of war.</li> <li>37. Who ought to bear the expenses of a war.</li> <li>38. Trajan compared the <i>fiscus</i> to the spleen.</li> <li>39. The custom of the Gauls.</li> <li>40. Whether private losses sustained in war ought to be made good.</li> </ol> |
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[1, 2] Cicero lays it down that in a well-ordered State the laws of Offic., bk. 1. war should be scrupulously observed. Alike in beginning a war and in carrying it on and in ending it, law has a most important position and so has good-faith. The rules of feacial law, to which we have just Laws, bk. 2. alluded, aim at securing this. For, as Cicero also says, there are two kinds of strife—one conducted by discussion and the other by force: the one appropriate to men and the other to beasts; and recourse must be had to the latter when the former can not be used. And this is taken to have been the meaning of the poetical conceit that Chiron, the centaur—whose upper part (so the fiction ran) was that of a man and his lower that of a horse—was the preceptor of Achilles, as if to show that a good prince ought not only to be endowed with wisdom and judgment and other mental gifts, but also to be trained to feats of strength and arms; for the

use of force against those who will not submit to what is fair nor be restrained by reason is not unjust. Nevertheless, a general, like a surgeon (it was a saying of Scipio's) ought to use steel only in the last resort for effecting his cures.

Plut., Apoph.

[3, 4] War, therefore, is justifiable when its object is to procure peaceful existence and freedom from outrage, and when begun in such a way as that peace may appear to be its sole object. That is what Martianus Cæsar was aiming at in his memorable saying: "So long as a prince can live in peace he ought not to take up arms—so many and so great are the ills which spring even from what may be styled a just war."

On the Kingdom of God, bk. 19, ch. 7.

And these ills drew from St. Augustine the following outburst: \*

"If I should stop to recite the massacres and the extreme effects hereof, as I might (though I can not do it as I should), the discourse would be infinite. Yea, but a wise man, say they, will wage none but just war. He will not! As if the very remembrance that himself is man ought not to procure his greater sorrow in that he has cause of just wars, and must needs wage them, which if they were not just were not for him to deal in, so that a wise man should never have war; for it is the other men's wickedness that works his cause just, that he ought to deplore whether ever it produce wars or not. Wherefore he that does but consider with compassion all those extremes of sorrow and bloodshed must needs say that this is a mystery, but he that endures them without a sorrowful emotion, or thought thereof, is far more wretched to imagine he has the bliss of a god when he has lost the natural feeling of a man."

So far St. Augustine. For there are certain lawful incidents of war (as Livy says) which each side must be ready to endure, just as it may also produce them—e. g. burning of crops, destruction of buildings, loss of men and horses as booty. These are of course a hardship to him who has to endure them, although not in every case dishonoring. Our first care, then, must be for peace, which, as Cicero says, refuses to have any truck with treachery and baseness.

Offic., bk. 1.

Philipp. 13.

[5] Further, as the same writer says, although the name of peace is musical and the thing itself both pleasant and profitable (for he can not hold dear either private hearths or public ordinances or the laws of liberty who delights in dissension and slaughter of his fellow-citizens and in public war) yet an honorable war, according to the saying of Demosthenes, is ever to be preferred to a disgraceful peace.

Dig. 1, 1, 5.

c. 1 and 2, C. 23, qu. 1 and c. 12, X. 2, 12.

[6] Just wars are, indeed, enjoined by the Law of Nations (*ius gentium*), and are permitted both by the canon law and by the law of God, for God himself ordered the Jews to make war on the Amorites

c. 1, 3, and 5, C. 23, qu. 1, Deut. 2.

Letter 1, to Boniface.

and other peoples. St. Augustine, accordingly, wrote: "Beware of thinking that no one who follows arms pleases God, for David, a man after God's own heart, was of the military profession and so was that

\* Transl. of *de Civit. Dei* by J. H., A. D. 1610.

centurion whose faith is commended by divine attestation, and other holy men also."

[7] Now in order that a war may be styled just, it ought in the first place to be declared and undertaken under the authority and warrant of a sovereign prince, in whose hands is the arbitrament of peace and war.

c. 4, C. 23, qu. 1.  
St. Aug., bk. 22 against  
Faust., ch. 74.

For a private person has no business to begin a war, seeing that he can, and ought to, assert his right in the courts; and it is a breach of the prince's prerogative for a private person, unwarranted by law, to assert his right himself with royal hand. Nor is any one competent to initiate any variety of hostile activity without the knowledge and counsel of the prince. And he is liable under the Julian law against treason who, without the warrant of the prince, has either made war or summoned a levy or gathered an army together. And so Cato urged the recall of the army and the surrender of Cæsar to the enemy on the ground that Cæsar was campaigning in Gaul without having been authorized by the people.

Dig. 4, 2, 13.

Cod. 11, 47.

Dig. 48, 4, 3.

Plut., on Cato of Utica  
and Jul. Caes.

[8] For, among the Romans the arbitrament of peace and war was in the hands of the people in whom sovereignty was vested, as appears from many passages of Livy. The Senate, accordingly, ordered the military tribunes (says Livy) to propose to the people on the earliest possible date a declaration of war against Veii; and the war with Præ-

Bk. 4.

neste, too, was entered on by an ordinance of the people after a *senatus consult.* And, after authorization by the Senate, the people bade the

Livy, bk. 16.

making of war on the Palæpolitani and on the Vestini and on the Æqui.

Livy, bk. 18, 19.

Since, therefore, the people has conferred on the prince by the *Lex Regia*

Dig. 1, 4, 1.

all its sovereignty and power, this arbitrament of peace and war is his alone and resides in him and inheres in his princely dignity in such sort that it can not be severed from him. And Holy Scripture shows that this right has always belonged to kings.

1 Sam., ch. 8.

[9] There are occasions, however, when, e. g., pressing necessity or the absence of the prince, coupled with the hazards of delay, may justify a commencement of war even without his sanction, and this is especially so for purposes of defense, which is open to any one by the law

By inference, Dig. 43,  
24, 7, 3, at end.  
Cod. 10, 32, 54.  
Dig. 42, 8, 10, 16.

of nature. On such occasions it will be lawful not only to ward off the wrong, but also to take vengeance for it and to drive the enemy out of his own land if we can not otherwise obtain safety from him, for one can not be said to overstep permissible precaution who does what it would be dangerous to omit. And this is shown at length by Marianus Socinus (the grandson), who holds that such a war ranks as a just war even as regards the consequences, and that the rules of war apply (consequences being deduced from their causes) and therefore that anything captured during that war belongs to the captor.

c. 2, C. 23, qu. 1.

Consult. 68, vol. 3.

Dig. 39, 5; 2, 7, and 3.

[10] And this, he says, is especially so in dealing with rebels, for every one not only may, but must, foil their attempts without waiting for the prince's command, should delay be perilous. For, one who has it in

Generally in Bodin  
on The Republic,  
bk. 1, last ch.

Dig. 1, 1, 3.  
Cod. 3, 27, 1.  
c. 2, in Clem. ii,  
11, at end.

his power to ward off a wrong from a comrade, yet forbears to do so, is as much in fault as the actual perpetrator. This being so in ordinary cases, what are we to say when it is the prince who is threatened, especially seeing that these machinations against the sovereignty of the prince and the peace of the State render their authors liable, by the very fact, to the penalty of treason and to death or captivity as enemies and, much more, to forfeiture of their property to the captor.

Dig. 48, 8, 3, 5;  
and 49, 16, 7.  
Dig. 41, 1, 51.

Extrav. Hen. vii.  
Qui sint rebelli.  
Gloss on Extrav. Hen.  
vii, qui sint rebelli and  
thereon Bart. and Curt.  
jun., Consult. 137.

Among the examples of this which Roman history furnishes, a notable one is that of Lucius Pinarius, commander of the guard at Ænna in Sicily. He detected the plot of the citizens to revolt to the Carthaginians, but had no opportunity to send messengers to inform the consul Marcellus, though he was not far away; so he suddenly made a great slaughter, and thus kept the citizens under. This measure saved Ænna and received the approval of Marcellus, and the soldiery were allowed to keep the booty which they had taken.

Livy, bk. 34.

Cicero similarly praises the conduct of Octavius Cæsar, who, without waiting for a decree of the Senate, began hostilities against Antony of his own motion; for (as Cicero says) the season for issuing decrees was not yet and Cæsar saw that if he did not seize the moment for making war the city would be overwhelmed, and so no decree would ever issue again. And the Senate ratified and approved on behalf of the public the war which Cæsar had begun on his private initiative. In the same way Scipio Nasica earned much praise by offering himself as the leader of all good citizens and thus crushing, by private initiative, Tiberius Gracchus and his nefarious faction. For, in such disturbed times we must do what is required by the crisis rather than by custom. Custom is ever to be followed in time of peace, says Cicero, but in time of war expediency—a doctrine on which we shall have more to say elsewhere.

Cic., Philipp. 8.

Cic., Philipp. 5.

Val. Max., bk. 3, ch. 2.  
Appian, Civ. War, bk. 1.

See bk. 2, ch. 5.

c. 3, C. 23, qu. 1.

c. 4, C. 23, qu. 1.

Beside this, war may not be made save for just and necessary cause, and there should be an entire absence of the passion to do hurt and of vengeful savagery and of the lust of conquest. It was the securing of this that was the object of the rules prevailing among the Romans under their feacial law. Now he who makes war for an unjust cause not only sins, but the opinion is widely spread among men that he is nearly always beaten. For, as Propertius puts it,

Frangit et attollit vires in milite causa.

Quae nisi justa subest, excutit arma pudor.

(’Tis his cause which breaks or sustains the strength of a soldier; if no just cause underlie, disgrace smites on his arms.)

[11] Now the principal just causes of war are: the defense of our own empire, of our persons, of our friends, of our allies, and of our property; for no other warrant than the law of nature is needed to justify even private persons in defending themselves. A war, therefore, as Caius Pontius, the Samnite general, used to say, is a just one for those to

c. 1, C. 23, qu. 1 and  
c. 5, 6 and 7, C. 23,  
qu. 3. And c. 12, X.  
2, 12.

Dig. 1, 1, 3;  
and 48, 8, 9;  
and 9, 2, 4.

whom it is necessary, and recourse to arms is a duty for those who have no hope left save in arms. A war is based on a just cause, again, when it is waged in order to regain from the enemy something which he is forcibly and unjustly detaining, in the same way as the authors of a wrong or harm done with private and not public intent are handed over to punishment: we have shown above that this is provided for by the feacial law.

And so, after the death of Saul, David made war on Ishbosheth, Saul's son, who was trying to obtain the kingship in Israel which God had given to David by the mouth of the prophet Samuel. And Romulus made war on the Albans because their dictator, Cluilius, would neither restore certain captured property nor surrender the captors.

Another just cause of war is to take vengeance for some wrong which has been unjustifiably inflicted. Thus we read that King David made war on the king of the children of Ammon for his contemptuous treatment of David's messengers. And on the same ground of a wrong done, a war will be ranked as just which arises on a State's refusal to allow passage over its territory, provided such passage is innocent; by the law of human society such passage ought to be open. Accordingly, the Jews made war on the kings of the Amorites for refusing them innocent passage into the land which God had allotted to them.

[12, 13] And then a prince has a most just cause of war when he is directing his arms against rebels and subjects who abjure his sovereignty; for it is a heinous offense, against both God and the prince, for subjects to resist his authority, all power being from God alone; and St. Paul tells us "whosoever resisteth the power, resisteth the ordinance of God." And a wrong offered to the prince is reckoned to be offered to God, who said to Samuel, when the people were demanding of Samuel another as king: "They have not rejected thee, but they have rejected me, that I should not reign over them." David also fought with Sheba the son of Bochri, who had stirred up the people to transfer their allegiance from David to himself.

[14] Now rebels ought not to be classed as enemies, the two being quite distinct, and so it is more correct to term the armed contention with rebel subjects execution of legal process, or prosecution, and not war. There is, therefore, no need of the authority of the prince; the authority of a local magistrate will suffice.

[15] For the same reason, the laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates and robbers (these not being included in the term "enemy" [*hostes*]). Our meaning is that these persons themselves can not proceed under the laws of war and so, e. g., they do not acquire the ownership of what they capture, this only being admitted in the case of enemies [*hostes*]; but all the modes of stress known to the laws of war

c. 1, bk. 5, Tit. 1, 1u vi and c. 2, C. 23, qu. 2. c. 1, C. 23, qu. 2. St. Aug. quest. 10, on Joshua, bk. 2.

2 Sam., ch. 2.

Dion. Halic., bk. 3.

c. 2, C. 23, qu. 2 and c. 11, C. 23, qu. 8.

2 Sam., ch. 10-12.

c. 3, C. 23, qu. 2.

Deut. 2.

c. 2, C. 15, qu. 6 and c. 8, C. 23, qu. 8. Dig. 4, 5, 5, 1.

Rom., ch. 13.

1 Sam., ch. 8.

2 Sam., ch. 20.

c. 12, X. 2, 12. Dig. 6, 1, 6S.

Extrav. Hen. vii. Qui sint rebelli. Dig. 49, 15, 24; and 50, 16, 11S.

ibid.

Dig. 49, 15, 5 and the whole title. Dig. 49, 15, 24.

Dig. 49, 15, 10, 2; and 28, 1, 13; and 49, 15, 24. Dig. 49, 15, 5.

may be employed against them, even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his.

By inference, Dig. 24, 1, 3, 1. Philipp. 5.

And this seems to be what Cicero was aiming at when he deprecated the despatch of envoys to Antony and insisted that he should not be begged by words, but compelled by arms, to raise the siege of Mutina, a colony of the Roman people, and to break up the lines of investment which he had drawn round Brutus, a general, a consul-designate, and irreproachable citizen; for this (said Cicero) was not a case such as when Hannibal, an enemy of the State, was in days gone by desired by the Senate, through its envoys, to withdraw from Saguntum, but it was a case of a citizen; nor did it matter a whit (he continued) whether Antony was besieging Rome or a colony of the Roman people, founded for purposes of protection. And elsewhere the same writer says, in a letter to Plancus, that no peace ought to be concluded with Antony's faction by whom Brutus was besieged at Mutina, and he calls them loathsome robbers who ought to lay down their weapons and sue for peace, or, if they demanded it while keeping the field, ought only to get it by victory and not by bargaining.

Epist. 6, bk. 10.

Further, since there are on the prince's side all the essential elements of a just war, i. e., the right of making war and a just cause, but on the side of the rebels neither the right of making war (which we have shown above to belong to the prince alone) nor a just cause of war (the cause of a rebellion being no cause at all, as we shall shortly prove), it follows that a war waged by a prince with rebels is a most just one and that all measures allowed in war are available against them, such as killing them as enemies, enslaving them as prisoners, and, much more, confiscating their property as booty: for consequences are deduced from their causes.

Dig. 48, 8, 3, 5; and 49, 16, 7.

Dig. 39, 5: 2(7), and 3.

Dig. 41, 1, 51.

Gloss and Bart. on Extrav. Hen. vii. Qui sint rebelli. Curt. jun., Consult. 137.

And this I think a correct statement where the war is carried on under the direct sanction of the prince; but in other cases, although any one is allowed to defend himself and every one may act within the limits of his jurisdiction, yet the laws of war will only apply in a war waged by the authority and in the name of the prince; for it can not otherwise be called war. But the hostilities in which rebels engage are admittedly the very opposite of just war and so rebels can not proceed under the law of war and their captives do not become slaves. For where the cause is absent the consequence is absent likewise, and no one ought to be allowed to profit or injure others by his own wrongdoing.

Bartolus on Dig. 49, 15, 24. And c. 12, X. 2, 12 and c. 27, X. 2, 24.

Dig. 49, 15, 19, 2; and 28, 1, 13. Dig. 27, 14, 6.

Cod. 4, 48, 3.

Dig. 49, 15, 21.

[16] No obstacle hereto is created by Ulpian's response that those who in civil dissensions find themselves of the one party [*pars*] or of the other are not in the position of enemies, i. e., of persons between whom the laws of captivity and of postliminy prevail, and that therefore those

who are captured on the one side or the other do not become slaves; nor is any obstacle created by the fact that by the constitutions of the Kingdom of Spain, captures made in times of civil dissension are to be restored sevenfold. For these rules are meant to apply in times when citizens are at variance and strife with one another, and not in times when they are contriving against the sovereign power and fighting for the overthrow of the State; for at such times they must be classed as enemies. Ulpian accordingly used the word party [*pars*]; and "party" involves, says Cicero, a division of the State into two and a strife of citizen with citizen. "Faction" [*factio*] is Cæsar's term for this.

Dig. 49, 15, 21.

Span. Ordin., bk. 16. tit. 26, para. 2.

Dig. 4, 5, 5, 1; and 49, 15: 26 and 19(4); and 48, 4, 11.

Philipp. 13.

Gallic War, bk. 6.

Now it would be improper to call the war waged by Antony against the State a strife of parties; it was a secession from the Roman people. This was the ground of Cicero's dissent from Cæsar when the latter gave his opinion that the death penalty could not be inflicted on Cethegus and Lentulus, parties to Catiline's conspiracy, owing to the prohibition contained in the Sempronian law of a capital judgment against a Roman citizen without an ordinance of the people. Cicero pointed out that the Sempronian law, being framed in view of Roman citizens, did not apply to enemies of the State, who could by no means be citizens.

Against Catiline, 4.

And of course in the war between Rome and her seceding and rebellious allies (Latins, Campanians, Fidenates, Hernicians, Æquians, Etruscans, and others, who were subjects of Rome and not sharers in her sovereignty, according to the sufficient evidence of Livy and Appian and Dionysius of Halicarnassus), we read that the conquered were made to endure the utmost severities of war, and that captured property changed hands as booty. And captured persons were reduced into slavery; and of a truth they were much more harshly treated than ordinary enemies, the motive being that the best way to keep rebels in their duty was to deal with them in such a way that they could not rebel again, for so long as wrong-minded persons have the opportunity of doing wrong they will want to do it.

Bks. 2 and 8.

Civil War, bk. 1.

Bks. 3 and 4.

Accordingly when the Romans stormed Capua, which, after falling under Roman sway by surrender, had defected to the Carthaginians, the quæstors took as spoil 70 pounds weight of gold and 3,000 pounds weight of silver, and seventy prominent Senators were executed, and about three hundred Campanian nobles were thrown into prison and died there of varying mischances; and another great horde of Campanians was sold, and all the territory and public buildings fell to the Roman people. The same treatment befell the men of Fidenæ, a Roman colony, when they rebelled. Ænna in Sicily, too, the quarters of a Roman garrison, was crushed by a terrible slaughter of its citizens (as already described) when it contemplated defection. And mention may be found here and there in Cæsar of similar treatment being meted out to the Gauls when they revolted, after the reduction of Gaul to a province.

Livy, bk. 7.

Livy, bk. 36.

Livy, bk. 4.

Livy, bk. 34.

[17] Further, I think that in times of civil dissension the law of Solon will not be found inexpedient. This law—which, like many other very ancient laws, was at Athens carved on wooden boards—provided that whenever a sedition occurred and the people were split into two opposed factions any one who stood neutral should be deprived of home and fatherland and fortune and be banished from the country, an exile. The philosopher Favorinus thought this was a good rule to apply also when brothers and friends fell out; for (said he), if the friends of both sides have not sufficient influence to bring about the restoration of peace, then let some join one side and some the other, and in this manner prepare a way for an arrangement between the two. And I hold that in our own days such a law would be very useful in compelling all good citizens, directly a faction is formed by bad citizens, to join their forces in order to put it down and so to save both themselves and the State from such a ruin as, alas, we now see in process in different places, to the great hurt of the Christian commonwealth and to the subversion of these Low Countries; for while good citizens trust to get peace by submitting with excessive moderation and forbearance to the evil attempts of the seditious, they are fastening on themselves a terribly severe yoke of slavery which it will be vain for them to attempt to shake off hereafter; and so, maybe, their unwillingness to imperil either fortune or life on behalf of the State will lead them and the State to an inevitable ruin. For (as Cicero says) all evil may easily be checked in its beginnings, but as it gets older it commonly gets stronger.

Gell., bk. 2, ch. 2.

[18] Nor is it, as many seem to think, always the safest course to abstain from intermeddling in a war and to await as a mere spectator the issue of the war and the result to other persons' fortunes without hazarding one's own. That was the course which, when Antiochus and the Ætolians were attempting the expulsion of the Romans from Greece, their envoys tried to induce the Achæans (who were friendly to Rome) to adopt, begging them at least to remain neutral. The proconsul, Titus Quintius, showed in reply that nothing could be so ill-advised for the Achæans, seeing that, without gaining either thanks or esteem, they would be the prize of the conqueror.

Livy, bk. 35.

[19] And when first the Romans were seeking the friendship of the Achæans and Philip was claiming that they should at least abstain from armed intervention, the Achæan prætor, Aristenus, in a speech to his folk, showed that they must treat the Romans either as allies or as enemies and that there could not be a middle path,—which (as Pontius of Samos used to put it) neither secures friends nor removes enemies. And so, at the time of the quarrel between Cæsar and Pompey, although the excellent Porcius Cato in his zeal for the commonwealth differed in many respects from the leaders of the two factions, clearly approving the attitude of neither, yet, when war broke out, he felt that he ought not

Livy, bk. 32.

to remain in repose and so he joined that side which seemed on the whole juster; and when Brutus would have dissuaded him he wisely replied :

Summum, Brute, nefas civilia bella fatemur :  
Sed quo fata vocant, virtus secura sequetur.

(I admit, Brutus, the monstrous iniquity of civil war; but virtue will follow in security the summons of the Fates.)

and so on, as Lucan's poem continues.

Bk. 2.

[20] Now, this scrutiny, which of two factions has the better cause, is admissible in a democratic or an aristocratic State, where sovereignty is divided up among rivals; but in a monarchical State all that is best and wisest will follow the authority of the prince, in whom is the sole sovereignty, against his seditious and turbulent citizens and subjects. For after the republic has decided to commit its interests to the care of one man and the people has conferred on him by the *Lex Regia* all its sovereignty and power, that one man is the common parent of all and obedience to him is enjoined by the divine law, and everybody ought to defend and protect him as sedulously as the fatherland.

Dig. 1, 2, 2, 11.

Dig. 1, 4, 1.

Nov. 98, at end.

Paul, Ep. Rom., 12.

[21] Now no just cause can be admitted (says Cicero) for taking up arms against one's fatherland: Plato declared it monstrous to employ force against one's father or mother, but worst of all against one's fatherland, for there is no breach of natural ties, no crime, which it is justifiable to avenge by parricide. Cicero calls Antony the parricide of his fatherland, for making war on his State, whose safety one ought to place before the safety of one's father.

Quintilian,  
Declam., 286.

Dig. 11, 7, 35;  
and 1, 1, 2.

[22] I use the word 'State' [*republicam*] (which connotes, said Cornificius, that most sacred concept, fatherland [*patria*]) to mean not the soil itself (which would be absurd, for all soil is a brave man's fatherland), but in Cicero's sense as an assemblage of individuals compacted into a society by identity of law and community of interest. And that was the drift of Censorinus's reply to the Carthaginian envoys, as given in Appian, i. e., that the city of Carthage, whose freedom the Romans had guaranteed, did not consist of walls and buildings, and that it was these latter which it was proposed to destroy.

To Herenn., bk. 4.

In his Punic War.

Nor can a faction of aristocrats [*optimates*] be called a State (says Cicero), nor a seditious and conspiring populace, for an unjust populace (which he dubs a usurper) can not found a State. For although (as just said) one who is animated with hostility towards State or prince may be by birth a citizen he has voluntarily become an enemy and is called *perduellis*, a term ordinarily applied to public enemies. And indeed there is such an intimate connection between these two, prince and State, that no one can be an enemy of the former without being also an enemy of the latter, and conversely.

Dig. 48, 4, 11. Dig. 50, 16, 234.

Ibid.

We ought to die for our country (says Cicero), to give up ourselves entirely for it, to place all we have at its disposal, and, as it were, to con-

Laws, bk. 2.

secrete ourselves to its service. And the same writer says that a man deserves encomium who goes out to death on behalf of his State and who shows that our fatherland is dearer to us than ourselves. We ought to adapt all our actions not to our own expediency and advantage, but to the well-being of State and prince. On which count Demaratus of Sparta won a large meed of praise and so did Aristides, Phocion, and Themistocles, all Athenians, and the Romans, Tarquinius Collatinus, Camillus, and Rutilius. These all bore with complete serenity wrongs done to them by their country and contrived no vengeance, though they had the opportunity of doing so. Nay, Themistocles preferred to die by poison rather than help the Persian king, to whom he was bound by many honors and acts of bounty, to make war on his fatherland, albeit an ungrateful one. And Camillus, a man of the best character, who had deserved most highly of his country, yet had been exiled, forgot the wrong and ran extreme danger in order to render help to his country, which he restored by driving away its enemies.

[23] Again, disobedience on the part of subjects and rebellion, against the prince is treated as a heinous offense and put on a par with heresy, and the disobedient offender is called an infidel. For how, asks St. Jerome, can he be faithful in the matter of God [*in substantia Dei*], who can not keep faith with his earthly lord? And so, no matter how grievous are the burdens which a king imposes on his subjects, they may not rebel, for it is better to bear all ills than to connive at one; and hard as the burden may be which the superior has imposed, borne it must none the less be, and suffered with dutious self-surrender, obedience being a good thing in itself; for it is the general pact of human society that men must obey their kings. Wherefore, when Rehoboam, Solomon's son and successor, refused to lighten the least whit the very heavy yoke placed on the Jews by Solomon, saying that he would instead make his father's heavy yoke heavier, although it was in consequence hereof that the ten tribes of Israel, cutting themselves loose from the tribes of Judah and Benjamin, abandoned their king and chose another, Jeroboam, yet they did not go quit of blame; for the Lord was wroth with the whole seed of Israel and destroyed them and caused them to be scattered for as long as He should drive them away from His face, because they had renounced their union and had chosen another king for themselves.

Likewise, although King Nebuchadnezzar was an unbeliever and did much wickedness and ordered that his golden image should be worshipped and that those who refused should be cast into the burning fiery furnace, yet Daniel said to him, "Thou art a king of kings, for the Lord of heaven hath given thee a kingdom and power and sovereignty"; and the Lord said through the prophet Jeremiah, "Now have I given all these lands into the hand of Nebuchadnezzar, the King of Babylon, my servant; and the beasts of the field have I given him also, and all nations

shall serve him and his son and his son's son, until the very time of his land and of himself shall come; and many nations and great kings shall serve him." And the prophet Baruch said, "Pray for the life of King Nebuchadnezzar and for the life of Balthazar his son, that their days may be like the days of heaven upon earth." And the prophet Ezekiel inveighs bitterly against Zedekiah, King of Judah, reproaching him for his perfidy and rebellion against his King Nebuchadnezzar. David, also, though designated king of the Jews by divine authority, yet always rendered royal honors to Saul while he was still reigning, even though Saul had been reduced by divine law to the position of a private person in the kingdom and was hostile to himself: and when Saul entered into the same cave in which David was hiding and David could have cut him off alone with little trouble, he refused to do so, saying that he would not stretch forth his hand against the Lord's anointed. And David, too, ordered the execution of the man who brought the news that he himself had killed Saul, saying, "How wast thou not afraid to stretch forth thine hand against the Lord's anointed?"

Jerem. 27.

Baruch, ch. 1.

2 Chron. 36.

1 Sam., ch. 24, 26.

2 Sam., ch. 1.

Kings, therefore, and princes we ought to revere with extreme dutifulness, if they be good, as being sent by God (in the words of St. Peter) for the punishment of evil-doers and for the praise of them that do well; but if they be bad we must endure them with patience, for the sins of princes and kings must be borne with and left to the judgment of God, who is pleased at times to visit nations for their sins with iniquitous princes. For, as Holy Writ has it, "God makes a man to reign who is a hypocrite because of the offenses of the people." "For there is no power but of God," St. Paul testifies, who also bids us to obey princes.

1 Epist., ch. 2.

Job, ch. 34.

Alfons. of Castile  
Against heres., on the  
word Potestas.

1 Epist., ch. 2.

And St. Peter would have us be subject to our masters, even the froward; and he also teaches that kings are to be honored, although in those days no king had as yet accepted Christianity, but all were unbelievers and extremely cruel persecutors of the Christians; for every one knows about the cruelty of Nero and Domitian and others, which is commemorated in the writings of so many authors, yet the Christians rendered obedience to these same, in accordance with God's command, so far as nothing was required which was offensive to God, to whom they knew that obedience was due rather than to man.

Acts, ch. 5, v. 29.

[24] Whence it is clear that, although a tyrant who forcibly and illegally usurps the throne may be killed by any one if there is no other way of getting rid of his tyranny, and although under the Valerian law, his head and goods were forfeit who had formed the plan of usurping the throne, yet he who is prince by right of succession and election may not be killed by a private individual, however unjust and cruel his conduct may be, nor may his people put him off the throne or defect from him. And this was declared by the council of Constance, as also that all who assert the contrary opinion are heretics.

Plut., Life of  
P. Valerius,  
Dion. Halic., bk. 5.Felinus on. c. 14  
(?) X. 2, 26.Brixensis, Repertory,  
on word Tyrannus.  
Dom. a Soto, on Justice  
and Law, 5, 1, 8.Rom., ch. 13.  
Titus, ch. 3.

Sess. 15.

Alfons. of Castile  
against heres., on the  
word Tyrannus.

[25, 26] For a lawful prince, however cruel and unjust, can not be called a usurper; and since, by the *Lex Regia*, nay, by the ordinance of God, all sovereignty and power has been conferred on the prince as against the people, the people can not pass in judgment on him, for the inferior can not bind the superior by a judgment. And this is the meaning of the prophet when he says, " Shall the axe boast itself against him that heweth therewith? or shall the saw magnify itself against him that shaketh it? "

Whence Pope Nicolas in a rescript declared it as clear as day that no one of lesser authority can bind one of greater power by his findings or impose limitations on him of his creating. Accordingly, the Emperor Marcus Aurelius's saying is correct, namely, that the magistrate is the people's appointed judge, the king the magistrate's, and God the king's. And indeed if a prince, albeit deriving his power from God, can not punish or condemn any one without a hearing, by what authority can subjects, the recipients of no such power, expel of their own motion or put off the throne the prince in whose sovereign power they are and whom they are commanded to obey, seeing that, by the law of Solon, not even a usurper may be killed without a hearing of his case and that it is repugnant to natural law that an inferior should exercise jurisdiction over a superior and the same person be both accuser and judge. And so, the *Lex Julia* (Chap. I) ordains very heavy penalties not only against those who actually kill the prince, but also against those who with wrongful intent further the inception of a plot to kill him or to effect anything adverse to the sovereign power.

Seeing, then, that we are bound both by divine and by human law to undergo all infamy and danger and even death itself, should occasion arise, in order to save either prince or fatherland, how can there be a just cause of rebellion? What we observe in the human body applies here: All the limbs yield obedience to the head, as being the nobler part, no matter what it orders, and they refuse no risk in order to preserve it; so also subjects, the limbs of the civic body, should put the safety of the prince, who is its head, above all private advantage. Now there was among the Jews a sect of men, held in high esteem and called Essenes, i. e., executors of the divine law, who championed this doctrine, maintaining that kings and princes, irrespective of their character, ought to be inviolable by their subjects, as being sent by God.

Nor will any one attach importance to the case of Tarquinius Superbus, whose wickedness led to his expulsion from his kingdom, for, in the first place, he was not a king but an unmistakable usurper (having obtained the throne not in lawful manner, but by force, after having most basely slain his father-in-law Tullius); and in the second place, as the jurisconsult Proculus says, the question to be asked is, What does the law say that we ought to do? and not, What is done at Rome? For it is

a mistake (pointed out by Cicero) to imagine that everything for which a precedent can be found is lawful. What has been said applies where the supreme sovereignty is in the hands of a single person; but in cases when it is lodged in the people or in an aristocracy [*optimates*] it is undoubtedly lawful to deal with a tyrant by legal process, if time allows; and, if not, he may be got rid of out of our midst by any means whatsoever. It was the former course which the Senate adopted in order to get rid of Nero, and the latter in the case of Maximinus. For it is noteworthy that Roman emperors were not vested with full sovereignty, although several of them tyrannically usurped it; and this is shown by the expression which Suetonius employed about Caligula: "He almost changed the character of the chief magistracy into a monarchy," the Roman Emperor being nothing else than chief magistrate and the ultimate sovereignty being with the people.

Appian, *Proœm.*, 1. 1.

Bodin, on *The Repub.*, bk. 1, ch. 8.

[27] For kings who abuse their position the Pope has various modes of restraint and of compelling them to deal justly, for he is God's regent on earth and has received from Him both swords, the spiritual and the temporal, for the peace and preservation of the Christian commonwealth. Pope Nicolas, accordingly, reprov'd Lothair for his sins, and Gelasius used threats to Anastasius. Innocent I excommunicated the Emperor Arcadius for countenancing the expulsion of St. John Chrysostom from his see. Nay, where the interests of the Christian commonwealth require it, the Pope can not only restrain, he can also depose, just as God (whose vicar the Pope is) deprived Saul of his kingdom and raised up David in his stead. Accordingly, Pope Zacharias deprived Childeric III, King of the Franks, and absolved the Franks from the obligation of their oath. Innocent IV in the first instance excommunicated the Emperor Frederic II for his crimes: and, when this measure proved ineffective, he adjudged him unworthy of the empire and freed his subjects from the tie of their sworn allegiance. And the same Pope gave to the King of Lusitania his brother, the count of Bologna, as a colleague, because of his neglect of duty.

c. 26, C. 23, qu. 5.

c. 21, C. 2, qu. 1.

c. 10, Dist. 96.

1 Sam., ch. 6.

c. 3, C. 15, qu. 6.

c. 2, bk. 2, Tit. 14, in vi.

c. 2, bk. 1, Tit. 8, in vi.

Now, to attribute to the people the power to do this (as some would like to do) is not only absurd and improper, but also subversive of the State; a king is not to be forthwith branded tyrant and unjust, because in some little detail of his rule he does not please the people, for on that showing kings would be nobodies. Why, even Moses, the justest and sagest of magistrates, would be pronounced a tyrant, for almost all his injunctions and prohibitions were displeasing to the people. Moreover, we ought not to talk about "monarchy" and "royal power" in cases where a State is governed by a king subject to the approval of the people, since the prosperity of the State is then dependent on the people—than whom nothing could be more foolish and extravagant and, when it blazes out against the good, more insane. For, as Livy says, it is characteristic

Fern. Vasquez, *Illustr.*

Quest. 1, 5, 10.

Hotman, *Franco Gallia.*

Girard de Bernard,

*Hist. France*, bk. 3.

c. 13 X. 2, 1 and c. 1.  
Extrav. comm. 1, 8.  
In c. 3, C. 15, qu. 6.

of the mob to be either humble servants or haughty masters. And Xenophon, who was at once an able commander and a philosopher, testifies that popular power is fatal to virtue and can not be established save by the removal of all good men—a thesis adopted by Seneca in his terse question, “ Who that is pleased by virtue, can please the people? ” Consistently therewith we read how, among both Athenians and Romans, citizens of outstanding distinction, who had rendered excellent service to the State, were unjustly made to suffer ostracism, exile, and death through the malevolence of a stupid and ungrateful rabble.

Now, that was a brilliant prophecy that Anacharsis, the Scythian, made of the speedy downfall of Athens, based upon the fact that, though her wise men might give advice, yet it was her fools who gave the decision; for he observed how her Senate looked to the people to take measures for the well-being of the State (a matter of quite sacred importance)—which is as much as to look for wisdom in fools and madmen. Of a truth, highly ridiculous as it would be to divide the whole of every one’s wealth equally among the citizens, it would not be so ridiculous as to do the same thing with the ultimate sovereignty, because (as Bodin neatly puts it) any one can enjoy wealth, while governing wisdom is the rarest endowment of nature; and, much as an individual tyrant is to be dreaded, a mob of tyrants is more to be dreaded still. And those who laud the popular sovereignty of the Romans seem not to have read their history aright and not to have given adequate consideration to the miseries which so many and frequent seditions, secessions, struggles, and civil wars brought upon the State, all of which were entirely due to the holding of sovereignty in common, with the attendant difficulties of equal distribution thereof. But these numerous matters the plan of my treatise does not allow me to discuss.

In Method. hist., ch. 6.

[28] To continue the consideration of the just causes of war: War may not be declared against infidels merely because they are infidels, not even on the authority of emperor or Pope, for their infidel character does not divest them of those rights of ownership which they have under the law universal [*jus gentium*], and which are given not to the faithful alone but to every reasonable creature. For the earth is the Lord’s and the fulness thereof, the world and all they who dwell therein, and the Lord makes his sun to rise on the just and the unjust. Accordingly, although Nebuchadnezzar was an unbeliever, yet God gave him kingdom and power, as just said. This opinion is widely received, as Covarruvias shows.

Genes., ch. 1.  
Matth., ch. 5, end,  
and ch. 6, begin.

On c. 4, Reg. jur.  
in vi, in 2<sup>nd</sup> part,  
Relect. §9.

[29] Nor is a war with infidels to be called just on the ground that (say) they refuse to acknowledge and obey the emperor as the lord of the whole earth, in accordance with the doctrine which has very many authorities in its favor. For men of the profoundest learning have clearly demonstrated that this widespread opinion is false and that the

Cod. 7, 37, 3.  
Dig. 14, 2, 9.  
Cod. 1, 1, 1.  
Dig. 49, 15, 24.

Card., Alb., Fulg.,  
Alc., Chas., Domin.  
de Soto and others.

emperor is not the lord of the whole earth. These are enumerated and followed by Covarruvias and Fernando Vasquez.

On c. 4, Reg. jur., in vi, in § 9 aforesaid.

Illustr. Quaest., 1, 20 and following ch.

This, then, is no ground on which the emperor can make a just war on unbelievers who are not under his sway: for no one can punish a person who is not in his power. More than that, such a war could not be rendered just by the authority of the Pope, for he has no jurisdiction, whether temporal or spiritual, over unbelievers, except as far as it is needed for the peace and prosperity of the Christian commonwealth; and it is not a function of the church to punish unbelievers who have never received the Christian faith, according to St. Paul in his Epistle to the Corinthians: "For what have I to do to judge them that are without?"

Dig. 2, 1, 20. And c. 2, bk. 1, Tit. 2 in vi. And Cod. 3, 15.

[30] On this, Thomas says that the prelates of the Church have received power over those only who have once subjected themselves to the Christian faith: and so a just war may be made on heretics who have abandoned the Christian faith. And Alfonso of Castile has on this topic a fine passage. The grounds on which a just war may be waged with infidels are, then, those on which one may be waged with any other people, and also that they are found hindering by their blasphemies and false arguments the Christian faith and also the free preaching of the Gospel rule, this being a wrong to Christians, who are entitled to preach the Gospel over the whole world.

Ch. 5.

Lawful punish<sup>t</sup> of heret., bk. 2.

c. 11, C. 23, qu. 8. Innoc. and doctors in c. 8, X., bk. 3, Tit. 34. Thos. Aquin. 22, 10, 8.

[31] Now these just causes of making war ought to be weighed with deliberate judgment by the princes and kings, in whose hands is the authorizing and the planning of war; but if it chance that their motive for making war is human greed, that will not be imputed to the soldiery as a sin, seeing that they owe obedience to their prince. Accordingly, St. Augustine writes: "Should a just man happen to be serving as a soldier under a king who is even a sacrilegious person, he may rightly fight under his command, observing the ordered conditions of citizenship; for what he is commanded is either certainly not against God's precepts or it is not certain whether it be; so that, maybe, the iniquity of the command may involve the king in guilt, while the conditions of his service establish the innocence of the soldier."

c. 4, C. 23, qu. 1.

Bk. 22 against Faust. Manich., ch. 75, and c. 4, C. 23, qu. 1.

[32] It is, therefore, permissible for a Christian soldier to campaign under a pagan commander, for even Julian the Apostate had Christian soldiers and they obeyed him when he said, "Engage in battle for the defense of the State." But when he said, "Engage in battle against the Christians," they recognized their heavenly commander. And we are told that when the same emperor tried by the gift of largess to lure them to the sacrifices of the gentile gods, they returned him his largess and professed their Christianity with the utmost willingness in their longing for martyrdom and were dismissed the service. We read too how Marcus Aurelius Antoninus brought to a conclusion the war

c. 94, C. 11, qu. 3.

Sozomen, bk. 5, ch 17. Cassiodorus, bk. 6, Tripart. hist., c. 30. Nicephorus, bk. 10, ch. 23.

against the Marcomanni, overcoming the Sarmatians, the Vandals, and the Quadi, by the aid of the prayers of his Christian stipendiaries in which they besought God to rain on themselves and to thunder on the enemy. This demonstrates that subjects may campaign under a pagan and even heretic commander, unless it be transparently clear that the war is unjust; for service is due to God rather than to man.

[33] Now, although we are taught that we must obey even an infidel and unjust king, yet there are limits to this obedience; whence, although the Children of Israel were ordered by God to obey King Nebuchadnezzar, yet when that king issued his decree that they should worship his golden image (a decree which overstepped the bounds of royal power) the best of the Children of Israel preferred to be cast into the burning furnace rather than to obey the king's decree; and God so approved their choice that he saved them harmless from the fire. And what Christ says in the Gospel is of the same import: "Render unto Cæsar the things that are Cæsar's and unto God the things that are God's": a teaching which the Apostle Paul most plainly set forth, saying, "Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honor to whom honor."

From the foregoing it may be gathered that our remarks so far about just causes of war deal rather with considerations of fairness and goodness and propriety, and not with the character of the legal result which is produced. Now, seeing that the right to make war is a prerogative of princes who have no superiors, discussion of the equity of the cause is inappropriate.

[34] A war may in one sense be styled just and yet not be waged for just cause; for the word "just" has varying meanings (as Budæus has remarked) and does not always indicate justice and equity but sometimes signifies a certain legal completeness. It is in this latter sense that we use the word "just" in connection with marriage and matrimony, and the age of attaining majority, and competence to bring suit, and sonship and liberty [*justæ nuptiæ, justum matrimonium, justa ætas, justa persona litem instituendi, justus filius, justa libertas*]. And Livy speaks of a just battle, using the word in the same sense: and it is in a like manner that the phrase "just war" is employed, meaning thereby a war publicly and lawfully waged by those who have the right of waging war.

We accordingly read in Ulpian: "Enemies [*hostes*] are those on whom the Roman people has publicly declared war or who have publicly declared war on the Roman people, but others are termed brigands or robbers" [*latrunculi vel prædones*]. And Pomponius says, "The term 'enemies' [*hostes*] implies that they have publicly declared war on us or we on them; all others are thieves or robbers." In such a war, even though it be not begun with just cause, the laws of war and captivity and postliminy, such as are appropriate in the case of enemies, are called into

Paul Orosius, bk. 7, ch. 15. Eusebius, bk. 5. Eccles. hist., ch. 5. Niceph., bk. 4, ch. 12.

Acts, ch. 1. c. 5, C. 15, qu. 6 and c. 94, C. 11, qu. 3.

1 Pet., ch. 2.

Dan. 2.

Matth. 22.

Rom. 13.

Dig. 17, 2, 3.

Bk. 49.

Dig. 49, 15, 24.

Dig. 50, 16, 118.

Institutes, 1, 10, pr. Dig. 23, 2: 1 and 54. Dig. 34, 9, 13; and 38, 11, 1. Quintil., bk. 5, ch. 10. Dig. 50, 5, 2, pr.; and 49, 14, 16. Cod. 5, 34, 11. Dig. 1, 7, 2. Cicero, Topic. Dig. 28: 1, 1; and 50 generally; and 40, 8.

operation. This is abundantly evidenced by the fact that, though the Romans never began war save on just causes (their feacial law requiring close heed to that), yet their enemies, who could not have just cause (for both sides could not have it), became owners, even by Roman law, of the property which they captured in such a war and reduced captured persons into slavery; and that held good even where the enemy's case was palpably unjust. Dion. Hal., bk. 2. Dig. 49, 15, 5.

The jurisconsult Paulus is conclusive on this point in the passage where he declares it a dictate of natural equity that a man who has been wrongfully captured by foreigners and then has returned to his country reacquires his former legal position, to wit, by the law of postliminy. It is implied herein that a man becomes a slave if taken prisoner even by an enemy who is waging an unjust war, for there would not otherwise be any need of the fiction of postliminy any more than there is when a man is captured by brigands, in which case he does not become a slave. Ibid. Dig. 28, 1, 13; and 49, 15: 19(2) and 24.

Nothing more is needed, then, so far as concerns the legal effects which are produced and the bringing into operation of the laws of war, than that the war should be waged by parties who are within the definition of "enemies" and who have the right to wage war. And, on this way of looking at the matter, it seems possible to defend the opinion of Alciatus and of Fulgosius, namely, that there can be a just war on both sides. This is contrary to the opinion which is accepted by experts and which, if it be just cause of war that is adverted to, is highly reasonable, seeing that, enemies being in conflict with each other, their rights must be in conflict too, and one and the same cause of war can not be just both for this side and for that. Fulgosius and Jason on Dig. 1, 1, 5; Petr. de Ancharan. on the rule 'Peccatum' col. 13, verse Tertio quaero: Aretinus on Dig. 28, 1, 13; Alberic. de Rosa. on Cod. 1, 1, 4, col. 6; Abb. on c. 13, X. 24, 2—all of whom Natta quotes and follows, Consult. 284.

[36] Further, money is often declared the sinews of war; and that was the bearing of the jest of Titus Quinctius Flaminius, at the expense of Philopœmen, the Achæan prætor, who was furnished with much cavalry and heavy-armed soldiers, but little money, namely, that he had hands and legs, but lacked belly, which was also a description of the prætor's habit of body. Plutarch, Apophth.

[37] The question has, accordingly, often been raised, who ought to bear the expense of war: prince or people? The general view is that if the prince has royal revenues assigned him by the citizens it should be at his expense that the war is conducted. And this is a very reasonable view, too, for it is a common and oft-recurring principle with philosophers and legislators that all principalities and kingdoms and empires exist wholly for the public benefit of the citizens and not for the benefit of the heads of the State. Cicero, accordingly, writes: \* "There are two precepts of Plato to be observed by all men of authority in the government. The one is, in such sort to assert and defend the public interest that all their actions should refer to that, without any regard to their Angel. on Cod. 8, 11, 18. Jason and Zasius on Dig. 23, 3, 12. Gul. de Cuneo, Baldus and Cyn. on Cod. 1, 2, 11.

\* Translated by Roger Lestrangle, A. D. 1680.

own advantage. The other is, to attend the service of the whole in such sort that while they are serving one part they do not abandon another. It is in the administration of a government as in the case of a ward: the commission has a regard to the benefit of those that are delivered up in charge and not those to whom such a charge or care is committed."

Quest. illustr., ch. 1  
and following.

Baldus on Dig. 1, 16, 5.  
Boerius in treatise on  
Custody of the Keys.

Plut., Life of Demosth.

Kingdom of God,  
bk. 5, ch. 12.

Sex. Aurel. Vict.  
in Jul. (?)

Arctinus on Instit., 4,  
6, 13. Bartolus on Dig.  
33, 1, 13, 1. Oldra.  
Consult., 234. Cas. on  
Customs of Burgundy,  
title de just. § 4.  
Boerius, decis. 303.

Span. Ordin., l. 3 and  
5, tit 19, pt. 2.

Fernando Vasquez discusses this doctrine at length. If, however, the prince has no sufficient revenues, the whole realm ought to bear the expenses of war; and no definite limit to the contribution for this purpose can be assigned. For, in the words of the general Cleobulus' answer to the allies of the Athenians in the war against Philip, when they clamored for the fixing of a definite contribution, "War admits of no fixed ending." And it points in the same direction, that, in Cato's words, every well-ordered State should display domestic industry and a well-filled treasury and smallness of private fortunes; and Cato has posited the contrary as the vice of times of moral corruption, namely, public penury and private wealth, seeing that luxury and sloth soon corrupt a State (as Sallust narrates and St. Augustine proves).

Princes ought, nevertheless, to keep in mind that very moderate reply made by Tiberius Cæsar to the treasury officials who wanted the provinces to be burdened with tribute: "A good shepherd shears his sheep, but does not flay them." And another memorable saying is that of Trajan, when his wife, Poppœa Plotina, chid him for the chicaneries with which his procurators were vexing the provinces so sorely: he said that he was beginning to loathe such vile extortions, and he drew a remarkable parallel between the fiscus and the spleen, saying that just as in our bodies, when there is an enlargement of the spleen, the rest of the organism wastes away, so in a State, when the treasury of the prince is overswollen, the other members grow feeble and diseased.

It is deducible from what has been said that a citizen is not bound to follow the prince to the wars at his own expense, but that he ought to receive pay either from the prince or from the State. Should, however, very pressing necessity arise, e. g., in defense of prince or State, every one, regardless of sex or rank, is bound to join in the operations of the war; and the laws of the Kingdom of Spain visit with very heavy penalties those who shirk this duty.

[39] And this explains the custom of the Gauls to summon at the beginning of their wars the council of warriors, which by their common law was attended by all men over puberty, in full armor, and the last to arrive was put to death with all manner of torture in the sight of the assembly. So also a feudal vassal is under an obligation to assist his lord in a just war, even at his own expense.

[40] The question may be raised whether any loss which may be incurred by reason of the war ought to be made good. Well, where a man goes to the war for the defense of the State without pay, he deserves

Cæsar, Gallic  
War, bk. 5.  
By inference from  
Dig. 38, 1, 18.  
Specul. on Tit., de  
feu § quoniam ver. 12.  
Baldus on Feud. Law,  
bk. 1, tit. 17.  
Ludov. Rom. on  
Dig. 36, 1, 6, 6.

to be reimbursed any loss which he may suffer on that account, but loss sustained in war by a soldier who is serving for pay will not be made up to him—save that by the laws of the Kingdom of Spain loss of this kind is ordinarily to be made good out of any booty that may be taken. On the other hand, one who has been summoned to an unjust war has no action at law either for the recovery of pay or for reimbursement of loss, for no right of action is allowed to rise out of circumstances of disgrace [*ex turpi causa nulla datur actio*].

By inference from  
Dig. 14, 2, 2, 1.

By inference from,  
and Angel. on,  
Dig. 14, 2, 1.

Span. Ordin., l. 4, tit.  
25, par. 3.

Dig. 45, 1, 26 and 27;  
and 17, 1, 6, 3. Innoc.  
in c. 13, X. 2, 24.

## CHAPTER III.

*About the duel or single combat.*

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| <ol style="list-style-type: none"> <li>1. Why duelling is forbidden.</li> <li>2. Duelling forbidden when arising out of defamation.</li> <li>3. The usage of the duel very old in Spain.</li> <li>4. The duel was a usage of several peoples.</li> <li>5. Custom does not render duelling lawful.</li> <li>6. The custom of duelling alien to Greek and Roman institutions.</li> <li>7. Lawfulness of duelling with an enemy.</li> </ol> | <ol style="list-style-type: none"> <li>8. David slew Goliath in single combat.</li> <li>9. Single combat very important in war.</li> <li>10. The end of a war sometimes issues out of a duel.</li> <li>11. The combat between the Horatii and the Curiatii.</li> <li>12. Not always safe to obtain the result of a war by a duel.</li> <li>13. Of Metius Suffetius.</li> </ol> |
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The practice of duelling has, with complete justification, been forbidden by the Canon Law, as a detestable invention of the devil; and, with a view to its utter abolition, various censures and penalties have been ordained, not only against the combatants themselves but also against those who initiate or counsel, or are even present at, the combat.

[1] The reason is that this mode of settling differences subverts the judicial system and all the legal authority, with its provision of actions-at-law whereby every one may assert his right in court. There is, too, the impropriety of a man setting himself up as his own law-giver and judge, the very reason for the existence of laws and magistrates being that they may discriminate lawful from unlawful and award to every man his right. Moreover this mode of settling disputes may do violence to justice, for numbers of persons who have stupidly and foolishly submitted to the arbitrament of the gods of war a case which, both in law and in equity, was an excellent one, have died in the fight. Besides, it is wrong to tempt God, and this is what it amounts to when a duel is fought (as often happens) in order to clear up the truth. Lastly, both divine and human law forbid homicide; now a duel very often results in homicide; so the duel may be said to be prohibited, since the prohibition of anything is deemed to involve the prohibition of everything by which that thing is brought about.

[2] There are, however, some who hold that this kind of battle is permissible when one's reputation has been assailed, for (say they) he who does not trouble about his reputation is a savage, reputation being above profit and in the same rank as life. I do not, however, accept this view. For (in the emperor's words) courts are provided in active operation and the protection of the public law made accessible to all precisely in order that no one may arrogate to himself a right of private vengeance; nor can he who seeks from the judicial authorities redress for an

c. 22, C. 2, qu. 5.  
And c. 1 and the  
whole title, X, 5, 35.  
And whole title, X,  
5, 14. And Council  
of Trent, sess. 19.

Dig. 4, 2, 13.

Dig. 1, 1, 1.

c. 2, X, 5, 35.

c. 22, C. 2, qu. 5  
and c. 1, X, 5, 14.

By inference from  
Dig. 23, 1, 16.

Baldus on Feudal Law,  
bk. 2, tit. 53, c. 1, Coll.  
5. Cagn., Decius,  
Curt. Sen., Curt.  
Jun., and others whom  
Fern. Vasquez men-  
tions in Quest.  
illustr. 1, c. 47.

Dig. 29, 4, 26.  
Dig. 40, 2, 9.  
In Cod. 1, 9, 14.

injury offered to himself or his family be considered reckless and careless of his honor.

[3] Further it is notorious that this kind of combat was in vogue in very ancient times, especially in Spain, as much for the display of valor as for the discovery of truth; for when Scipio returned to Nova Carthago for the performance of his vows and for the gladiatorial show which he had arranged in honor of his late father and uncle, the spectacle was such as Livy describes in the following passage:

“The show was not of that class of men whom the trainers [*lanistæ*] usually procure, slaves, to wit, and freedman and such as sell their blood; but all the service of the combatants was voluntary and unpaid. For some were sent by the petty princes to show an example of the natural courage of their people; others came forward to fight in compliment to their general; others were led to give and accept challenges by a spirit of emulation. Some decided by their swords disputes which they had not been able or willing to settle by argument, with an agreement that the decision was to be in favor of the victor. Nor was this confined to men of obscure rank, but it included such distinguished and well-known men as Corbis and Orsua; these latter were cousins who had a dispute about the chieftainship of a city called Ibis, and they arranged that they would adjust it by the sword. Corbis was the elder. The father of Orsua was the last chieftain, having succeeded to that post on the death of his elder brother. Now Scipio was anxious to settle the dispute by argument and thus allay their jealousies, but they both asserted that they had refused that to their common kindred and that they would have no other judge, divine or human, than Mars. The elder’s pride was in his strength, the younger’s in his youth, and each preferred death to becoming the subject of the other. And as every effort to divert them from their madness failed, they gave the army a glorious show, and at the same time an illustration of the mischiefs that are wrought among men by the thirst for power. The elder, by reason of his experience in arms, and his address, easily mastered the unscientific exertions of the younger.”

Bk. 8.

So Livy.

[4] In later days, this mode of settling disputes was allowed among the Spaniards (although its inequitable character was admitted) for the purpose of avoiding lawsuits, in certain cases and subject to certain conditions. And the Lombards, too, had the custom of referring a controversy to the duel in certain cases, if there had been some default in the judicial proceeding and the judge’s decision was impugnable. And the Emperor Frederic Ahenobarbus decreed that on certain occasions matters should be left to the arbitrament of a duel: and a glance at the Salic law shows that the custom of the Gauls and such differs much from that of the Lombards, one of their extant constitutions being the follow-

Span. Ordin., bk. 8, tit. 14, par. 3.  
Tit. 4, On lawsuits, part 7.

Lombard Laws, tit. qual. quis se defen. deb. and tit. de purg. rei and tit. de hom. lib. hom.

Feudal Law, bk. II. tit. 53, c. 1, §§ 1 and 10.

ing (of Philip): "When a man is charged with some secret crime of a capital character, and he is admittedly a person who could be subjected to torture, but could not otherwise be condemned, let him, on the demand of the accuser, undergo wager of battle."

On Instit. 3, 1, 5. Joannes Faber deals with this constitution: and Guido Papæ refers Decis. 617. to it, adducing and explaining a certain other imperial constitution about the procedure in the duel and the grounds upon which it can be ordered. Decis. 191.

The duel is customary and very frequent in Italy, especially in defense of a man's honor. Hence there has been a considerable amount of careful discussion, on such points as, What matters may be settled by the duel? Which of the two adversaries is the challenger, which the challenged? Who are allowed the duel? When may the duel be declined? When may an auxiliary, ordinarily called a champion, be allowed? What about choice of weapons and ground? Must the opponents take the *jusjurandum calumniæ* (i. e., the oath that they are not wantonly making or denying the charge)?—and many other questions which frequently crop up in connection with this kind of battle.

[5] Numerous men of great learning, although well aware that this custom is invalid as being contrary to law—especially in view of the canon law's express prohibition of it to persons with a *locus standi* in either forum, when the question raised is one of sin—have, however, discussed the perversion just as if it were valid, seeing that the custom has held its ground in point of fact and that what obtains in fact is at times assimilated to law.

[6] Indeed, that custom of referring disputes between citizens and allies and comrades to single combat is not only repugnant to Christian institutions, but also far removed from the ancient discipline both of the Greeks and the Romans; for they reckoned it highly disgraceful that allies in war, who ought to reserve their joint strength for the upholding of their common cause, should be led to fight with one another, as often was the case, by foolish and dangerous vanity, and, rather than have their differences adjudicated on by laws that were common to both parties, should wish them to be adjusted by the sword: which is indeed a very unreasonable method and is just as if two philosophers or jurisconsults should decide with swords the question which of them is the wiser.

And of all the varieties of injustice there can be none baser or madder than that whereby a frail and slight person, to whom offense has been given, is branded with infamy unless he meets his opponent, no matter how much stronger than himself, in armed encounter and hazards his life: especially having regard to the provision of nature (pointed out by Bodin in connection with the Scythians) whereby those with the minimum of intelligence possess the maximum of bodily strength. And, in truth, on this reasoning even the strongest men if compared with beasts which surpass them in strength might deserve to incur infamy.

Decius, consult. 97.  
Curt., Jun., consult.  
173. Curt., Sen., on  
Dig. 12, 2, 31.  
Cagnol. and others  
mentioned by Fern.  
Vasq. in Quest.  
illustr., bk. 1,  
ch. 40.

Cod. 8, 52, 2  
and 1, 14, 5.

c. 13, X, 2, 1 and  
c. 1 and 2, X, 5, 32.

Dig. 28, 7, 20; and  
40, 4, 54.  
Alexand., consult.  
107, col. 6.

Method. hist., c. 5.

[7] A wise man ought, then, to exhaust all other expedients before having recourse to arms. But of course no blame attaches to those who resort to this kind of conflict for the public good and not for vengeance or private hate, for their conduct is even laudable. Accordingly a man who engages a public enemy in single battle pursuant to the orders of his general or with his consent (apart from which such irregular fighting is not permissible) not only does not sin against the laws and statutes of the Popes, but ought also to derive great glory from his act, as in the case of Torquatus, Corvinus, Marcellus, Scipio, Æmilianus, and others. For such combats are demonstrably lawful, upon the same principle as that upon which a war is just in which the combatants meet a glorious death on behalf of fatherland or Church. For there is no kind of fighting with an enemy in the course of a war which amounts to tempting God, within the meaning of the divine prohibition; to destroy an enemy is not an act of homicide, nor such as natural law forbids, but is part of the duty of a good soldier.

Dig. 3, 1, 1, 6.  
Hiero. Cagnol., on  
Dig. 50, 17, 125.

c. 9, C. 23, qu. 8 and  
c. 46, C. 23, qu. 5.  
Span. Ordin., bk. 3,  
tit. 25.

c. 13 and c. 41 (?)  
C. 23, qu. 5.

[8, 9] Accordingly it was just as proper for David to lay Goliath low in single fight as in the course of a general engagement. Indeed these encounters not infrequently determine the issue of the whole war. Livy, accordingly, when dealing with the fight between Torquatus and Gallus, says: "This combat was so decisive of the whole war that the Gallic army fled from their camps in a panic and crossed into Tibur and, shortly afterwards, into Campania." The same thing happened in the Social War: an enormous man, one of the Gallic auxiliaries whom Lucius Cluentius had raised for his struggle with Sulla, rushed forward and challenged any one on the Roman side and a Numidian of small stature slew him: the Gauls were thunderstruck and fled pell-mell: and after their line of battle had been thus broken, the rest of Cluentius' men refused to stand and fled in a panic to Nola.

1 Sam., c. 17.

Bk. 5.

[10, 11] Sometimes the commanders-in-chief arrange such encounters, both sides being represented either by individuals or by bands of equal size chosen by the chiefs, and the issue of the encounter is to determine the war. We read that this was done in days of old by Tullus Hostilius, King of the Romans, and by Metius Suffetius, King of the Albans. For each side was suffering loss through the frequency of battles fought with equal strength and so an abridged form of the war was arranged (in the language of Lucius Florus) and the fate of each side was left in the hands of the Horatii and Curiatii respectively, two sets of triplets; and a solemn treaty was first struck between the two kings and peoples and conditions agreed to whereby the conquered side was to be surrendered to the conquering.

Appian, Civil war,  
bk. 1.

Bk. 1, ch. 3.

Livy, bk. 1.

I do not think this kind of combat is improper, for even Thomas Aquinas (who compares the duel to trial by lot and who disapproves of it if the object is to prove or discover some secret matter) does not

2, 2, quest. 95, art. 8.

disapprove where the combat is for purposes of discrimination and the settlement of a controversy—such as certainly was the case in David's encounter with the Philistine, which met with God's approval. And I think this sound when the combat is arranged between the commanders-in-chief or by the authority of those who have the right to make war, with a view to avoid its evils. And we read that, when this is so, permission for the combat has occasionally been granted by the Roman Pontiffs. And so, after Charles of Anjou and Pedro of Tarragona had been warring for a long time about Sicily, they agreed, with the approval

Froissart, bk. 1.

[12, 13] I can not think that this manner of settling disputes is altogether safe, seeing that it is foolhardy to stake the sum of one's fortunes upon the hazard of the one or the other individual, or that it will in every case put an end to the war. What happened in the case of the fight between the sets of triplets shows this; for Metius Suffetius, through staking his fortunes and the whole result of the war and the valor of his army on the fortune and valor of the Curiatii, lost in a moment his kingdom and the liberty alike of himself and his men, in the defense of which they had been fighting for many years; and though the Romans were victorious by the award of fortune, to which they rashly had submitted themselves, still they did not find their victory altogether secure; for though Metius Suffetius did indeed, forthwith upon his defeat, surrender himself and all he had to the Romans, yet, when subsequently the expedition to Veii furnished the occasion, he repented of his rashness and tried

Livy, bk. 1.

to betray the Roman army.

Wherefore, when the safety and liberty of us all, or the whole of our possessions, is in the balance we ought to fight with all our available strength; for otherwise not only will the conquered blame his rashness, but the victor will also not gain complete safety. For (as Livy says) a man's spirit is finally conquered when the confession has been extorted from him that he has been beaten in a just and solemn war, not by stratagem nor by chance, but after a hand-to-hand engagement of all his forces. Nor, in a word, is it credible that any nation or any individual—as the Roman Senate found out in the case of the Privernians—will consent

Livy, bk. 8.

to stay in an irksome condition, longer than is unavoidable.

CHAPTER IV.

About Hostage-seizing [*Pigneratio*], which is called Reprisals.

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| <ol style="list-style-type: none"><li>1. Hostage-seizing permitted by very ancient custom.</li><li>2. In what circumstances permissible to-day.</li><li>3. Whether the custom is approved by law.</li><li>4. Sometimes an innocent man is punished, for sufficient cause.</li><li>5. A man, even though innocent, may thus be punished through his property but not corporally.</li></ol> | <ol style="list-style-type: none"><li>6. Hostage-seizing to the hurt of innocent persons illegal.</li><li>7. St. Ambrose reproved the Emperor Theodosius.</li><li>8. The principle underlying <i>l. vindicari C. de pæn.</i> (Cod. 9, 47, 20.)</li><li>9. In hostage-seizing it may happen that innocent persons are killed.</li><li>10. Hostage-seizing only permissible subject to the same conditions as war.</li></ol> |
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[1] It is clear that the forcible seizure of hostages (Greek *androlepsia*) was permitted by the customary law of most ancient times: for it was a very old usage that if a homicide fled into a foreign town and the townsmen would not surrender him on the demand of those who were entitled to deal with the crime, these latter were allowed forcibly to take hostages. For we read of the following ordinance: "If any one has met with a violent death, his clansmen and blood relatives have the right of androlepsy until there has been a judicial inquiry and those guilty of the homicide have been either punished or surrendered: up to three persons may be seized, but no more."

These words are used by Demosthenes in his speech against Aristogiton and the orator asserts in that context, but perhaps only out of devotion to his case, that hostage-seizing is lawful, not against those who shelter a fugitive homicide, but against those only among whom the killing took place. In Julius Pollux we read, however, that it was lawful also against those who had sheltered a fugitive homicide and who had not given him up, on demand, either to punishment or to vengeance and had not themselves fitly punished him: Budæus has commented on On Dig. 48, 19, 16, a. this.

[2] The conditions in which alone that kind of hostage-seizing which we call reprisals is lawful at the present day, are these: Brigands or pirates or others belonging to some country or other have committed homicide or other crime or have done some unjustifiable damage and the victims have not succeeded in obtaining from the government of that country or from those who have given asylum to the wrong-doers either their surrender or punishment: in such circumstances hostage-seizing is legitimate.

[3] Whether this is a lawful custom is, however, a subject of controversy. An especial point is made of the iniquity and injustice of inflicting punishment on an innocent person for the fault and offense of another, for liability to punishment attaches to the doer of the wrongful act. It is written: "The innocent and the guiltless thou shalt not slay" Exod. 23. and "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him." And "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin."

[4] Nevertheless there are admitted to be occasions on which punishment may, advisedly, be inflicted even though there is no fault. This underlies the rule given in Exodus: "If an animal kills a man, let it be stoned," and the laws of Draco, the Athenian law-giver, contained a similar provision. On the same principle, "if a woman approach unto any beast and lie down thereto" the beast, though void of reason and therefore incapable of guilt, is ordered to be killed with her, lest the beast so grossly contaminated cause the vile deed to be remembered. Lev., ch. 20. c. 4, C. 15, qu. 1 Moreover God took away the life of the son born to David out of illicit intercourse on account of the father's sin, and the young people of Sodom were consumed by fire together with their elders, without having themselves committed any sin. Hence God himself says, "I am a jealous God, visiting the sins of the fathers upon the children, unto the third and fourth generation."

[5] Now, although man ought not to imitate these divine judgments save so far as they go on unmistakable grounds, and although, accordingly, no law on any ground whatever ought to inflict bodily punishment for another person's offense (and that is why Covarruvias repro- Variar. resolut., bk. 2, ch. 8. In Cod. 9, 8, 5. bated the pronouncement made by the emperors Arcadius and Honorius to the effect that, in their imperial leniency and indulgence, they had spared the lives of the children of those guilty of treason; for they had no right to kill them), yet there are circumstances in which human law may inflict even on the innocent such punishments as fine, public sale of property, and so forth, on general grounds of public expediency and in order the more effectually to deter people from wrongdoing; and this is provided for in different places in the laws and canons, especially in the case of the sons and grandsons of those who have been guilty of treason against either the divine or human law, who are to be branded with *infamia* and with confiscation of their goods. Cicero says that the law is quite clear on this point. The reason of this was to make parents better citizens through their love for their children. These views of St. Augustine and others are set out in full and discussed by Covarruvias.

c. 7 and c. 8, C. 1. qu. 4. Dig. 48, 19, 26. St. Aug., q. 8 on Joshua. Cod. 9, 47, 22. And c. 2, X, 1, 2, and c. 3. X, 3, 11. And cap. Romana (?) X, 5, 39. And Cod. 6, 58, 14.

Ezek. 18.

Deut. 24.

c. 5, X, 2, 6 (§ si vero), and c. 6, Dist. 22 and the glossators thereon. And c. 23 X, 5, 33. And c. 10 (clauses 1 and 2), X, 5, 7. Gloss on c. 2, X, 1, 2. And there is a leading text in c. 11, C. 1, qu. 4.

2 Sam., ch. 12:

Genes., ch. 19.

Exod., ch. 20.

St. Aug., q. 8 on Joshua. Thom., Card. and others mentioned by Covarruvias, bk. 2, variar. resolut. c. 8.

As in Cod. 9, 8, 5 and the like. Epist. to Brutus.

Variar. resolut. bk. 2, ch. 8.

[6] Whence (if I err not) it is clear that hostage-taking of this description is lawful, as is deduced by common consent from St. Augustine—not, however, to the bodily harm of the innocent, who are not chargeable with any wrong-doing, but restricted to goods. For just as any one by mere consent can render himself liable to loss of goods, but not to hurt of limb or body, so also the laws and statutes, to which every one's consent is implied, can deal out punishment in proper circumstances even where there is no fault, provided it be pecuniary and not corporal.

[7, 8] And so the rebuke which St. Ambrose administered to the Emperor Theodosius was a very just one, when that Emperor ordered the promiscuous killing of the populace because a soldier had been killed in some disturbance. The Emperor (said he) was entitled to inflict capital punishment on the killers of the soldier, but it was unjust to order the death of innocent persons, even on the ground of the disturbance. The Emperor accordingly confessed his guilt with tears and did public penance in the sight of the whole Church and he issued a decree that if ever the Emperor should pronounce too severe a sentence in anger, the execution thereof was to be suspended for thirty days.

[9] Further, just as intentional killing of innocent persons, for example, women and children, is not allowable in war (if unintentional, as when a town is assaulted with catapults and other engines of war, the case is different, because such things are inevitable in war), so also in this hostage-taking, although it is not allowable to inflict bodily hurt on the innocent, but only to confiscate their property, yet it may be that they are unintentionally killed without any liability arising, provided that the hostage-taking could not otherwise be carried out.

[10] Hostage-taking, it must be noted, is not lawful save in circumstances and conditions in which war would have been held lawful alike by divine and natural and civil law. And so the authority of a sovereign possessing power to declare war is required, nor has a judge competence to authorize it, nor may it be resorted to between citizen and citizen. Although it was lawful in Athens of old to resort to androlepsy on private initiative, yet fines were fixed for improper exercise of it (as Budæus has noted, on the authority of Pollux). Accordingly, it is a practice which even to-day must be submitted to for just cause, that is to say, on the ground that the country against which it is allowed has neglected to take proceedings against certain of its citizens for a wrong done by them. In other circumstances, where there is no true and just cause, a grant of hostage-taking will be inoperative.

Jean. Papon., in Arrest., 5, 3, 2.

Dig. 9, 2, 13. c. 36, X, 5, 39.

Notable gloss on c. 19, c. 23, qu. 5.

A neat gloss on rubric Cod. 10, 47, which gloss commentators

follow in various places, and which is commended by Baldus

on Cod. 4, 13, by Alex. on Dig. 42, 1,

63, num., 10, by Angel. and Jas. on

Instit. 4, 6, 10, num. 68.

q. 10 on Joshua.

c. 2, C. 23, qu. 2 and c.

1, bk. 2, tit. 11 in vi:

and thereon Anch.,

Dom. and Franc., Jac.

de Canib. Bartolus on

reprisals, 33.

Sal. on Authentica,

Omnino, Cod. 4, 12, 4

(Nov. 52, 1). And c.

16, X, 2, 23. Jacob

de Bellou on Nov. 52.

c. 69, C. 11, qu. 3.

St. Aug., Kingdom

of God, bk. 5, ch. 26.

Cod. 9, 47, 20

and c. 69, C. 11, qu. 3.

c. 2, C. 23, qu. 2.

Novels 134 and 52.

Dig. 48, 19, 16, 8.

Dig. 40, 5, 26, 7; and

43, 4, 1, 5.

## CHAPTER V.

### *Of Capture in War and the Law of Postliminy.*

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| <ol style="list-style-type: none"> <li>1. Things captured in just war belong to the captors.</li> <li>2. The opinion of Alciatus rejected, that all present-day wars are civil wars.</li> <li>3. Difference between movables and immovables as regards capture in war.</li> <li>4. All booty is at the discretion of the general, not of the troops.</li> <li>5. Generals sometimes send their booty to the treasury.</li> <li>6. They sometimes divide it among the troops.</li> <li>7. Part of the booty may be due even to persons not present at the battle.</li> <li>8. Sometimes the booty is granted to the troops by proclamation and left to their discretion.</li> <li>9. A share of booty due to the prince and to the general.</li> <li>10. The Roman custom of dedicating part of booty to the Gods.</li> <li>11. No taking of booty unless the enemy has been completely conquered, nor before due signal given.</li> <li>12. Punishment to be visited on one who divides the booty fraudulently.</li> <li>13. No share in the booty due to a soldier who has fled.</li> <li>14. Soldiers ordered to sell their booty, so as not to overload the baggage trains.</li> <li>15. <i>Res sacrae</i> may not be taken as booty.</li> <li>16. Whether slavery is a natural or a human institution.</li> <li>17. Enslavement does not destroy natural liberty.</li> <li>18. No force (being merely matter of fact) sets up slavery (which is matter of law).</li> <li>19. Those taken prisoners of war by Christians nowadays are not made slaves, save in a war with infidels.</li> <li>20. A prisoner of war who returns home recovers his former liberty:</li> <li>21. Unless he has sworn to return to his captors.</li> <li>22. A deserter has no postliminy, unless he be a slave.</li> </ol> | <ol style="list-style-type: none"> <li>23. Those who surrendered have no right of postliminy, because taken with arms in their hands.</li> <li>24. The ancient controversy about Mancinus.</li> <li>25. Even women and children may be made prisoners of war.</li> <li>26. A prisoner in a just war must pay such ransom price as he has promised.</li> <li>27. To whom prisoners of war belong.</li> <li>28. A prisoner of war may not be killed upon private authority.</li> <li>29. The ransom price not to be increased after it has once been agreed on.</li> <li>30. The remedies open to one who has paid for a prisoner's ransom.</li> <li>31. Ransom of prisoners treated with favor.</li> <li>32. Neglect of duty to ransom a prisoner.</li> <li>33. Retaken land is within the law of postliminy.</li> <li>34. Other things which may also be within it.</li> <li>35. Whether things captured by the enemy and retaken from him vest in their former owner.</li> <li>36. Property which the enemy has acquired is not transferable [<i>in commercio</i>] unless of a kind which is susceptible of postliminy.</li> <li>37. When booty becomes the enemy's property.</li> <li>38. Things captured by pirates do not become their property and, therefore, if retaken, must be restored to their former owner:</li> <li>39. Though this is otherwise ordained by the laws of the Kingdom of Spain.</li> <li>40. Whether stolen property which has been captured in war ought to be restored to the original owner.</li> <li>41. Whether <i>res incorporales</i> can be captured in war.</li> <li>42. Dispute between the Thebans and Thesalians.</li> <li>43. A juristic whole [<i>universitas</i>] is not destroyed so long as one constituent part survives.</li> </ol> |
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Offc., bk. 1. The first business of justice, says Cicero, is to see that no one hurts another save under the pressure of some wrong done to him; and this is the underlying cause of just wars, as we have shown above at some length. Ch. 2, above. Bk. 6, ch. 18. But this saying of Cicero's is, however, repudiated by Lactantius, who

says that it is spoiled by the addition of the final member. The phrase "save etc." ought (says he) to have been left out in accordance with the teaching of Socrates to the effect that revenge, like all infliction of evil, is injustice. Nevertheless it is a safe statement that a sovereign prince who goes to war because of wrong done to him is entirely unblamable, when he is prompted, not by diseased pride, but by love of justice, and when his object is the restraint of a wicked enemy and the defense of his own people. For, as Seneca puts it, no wrong is done to you if you are yourself made to endure what you were the first to do to others.

[1] That is the basis of the rule whereby what we capture in a just war becomes our property; and this is a lawful mode of acquisition Instit. 2, 1, 17. (*justus modus acquirendi domini*), as Cicero indicates in the passage where he says, "Nothing is private property by its nature; but things become private property either by long enjoyment on the part of the first occupant; or by victory, as when acquired in war; or by statute or covenant or stipulation or partition." This principle is obtained from the Offic., bk. 1. law of nations (*jus gentium*) and is approved by the divine, the canon, 1 Sam., c. 30. and the civil law. And the reason of this rule is to be found not so much c. 9, Dist. 1 and c. 10 Dist. 1 and c. 25, C. 23, qu. 5 and c. 29, X, 2, 24. in the satisfaction given to the wronged party as in the restraint imposed on those who wage unjust wars, as St. Augustine remarks in the passage quoted in the preface hereto.

[2] I do not agree with Alciatus in his attempt to show that in a war between Christians things captured do not become the property of the captors. His argument is as follows: All persons in the Roman world became Roman citizens by the enactment of Caracalla; at the present day Christendom is the Roman world; all Christians are brothers by the law of Christ; wars occurring between them are more like civil wars; therefore, that rule of war whereby things captured become the property of the captors does not apply between Christians. On Dig. 50, 16, 118.

Why, if that were so, there could not be a just war between Christians, but its falsity is clear enough from what we have said elsewhere. So things captured even in this kind of war will become the property of the captors, save that a very ancient custom prevails among Christians whereby persons captured at any time in a just war do not lose their liberty. We shall shortly deal with this exception. Dig. 1, 5, 17. c. 24, C. 11, qu. 3.

It is impossible to describe a war between two sovereign princes or two free peoples as a civil war, for those are not fellow citizens who do not owe the same fealty and obedience; but even when the war is against rebellious subjects and citizens, the laws of war whereby we acquire ownership of things captured from the enemy are not straightway inoperative, for persons who embark on treasonable schemes against the imperial majesty cease to be citizens and become enemies. Cicero accordingly asserts with abundant argument that the war waged against Antony, an enemy of the State, was a just one, while on Antony's side the war was Bodin, Method. Hist., ch. 6, generally. Dig. 49, 15: 26 and 19(8); and 4, 5, 5, 1.

Dig. 1, 1, 5.  
c. 9, Dist. 1.  
Instit. 2, 1, 17.  
Dig. 49, 15, 28.  
Dig. 41, 1: 5(7)  
and 51.

Philipp. 8. unjust, and so, the laws of war which only apply to enemies did not apply in his favor—a topic discussed by us at length elsewhere, and what we then said can be imported here. On just war, above, ch. 2

[3] Again, it is indisputable that the ownership of things captured in a just war is transferred to the conqueror, but this is subject to a distinction between movables and immovables; for immovables, e. g., land, become public property—although we read that on more than one occasion, in days gone by, land taken in war was divided among the soldiery as a reward for strenuous exertions, and this was so ordained by Romulus. Dig. 41, 1, 16; and 6, 1, 15, 2.

Dion. Hal., Rom. antiq., bk. 2. And Alexander Severus made grants of land, taken from the enemy, to the border lords and soldiery, to belong to them provided that their heirs also were soldiers and never to devolve on civilians, for he thought that they would be all the keener soldiers if the rights which they defended were their own. See, however, that these lands are acquired for the prince and not for the soldiery, it will be left in the discretion of the prince to say how they are to be treated.

Elius Lampr., in Life of Alex. Sev.

Span. Ordin., bk. 19, tit. 26, par. 2. And according to the constitutions of the kingdom of Spain not only land but also any ships of war which are captured in a naval war are acquired for the king. But as regards movable booty of every other description, it was not customary to assign it to the soldiery nor had the general any right in it, but it was the quæstor's duty to sell it and to pay the price into the treasury. Bk. 7.

Bk. 7. And Dionysius of Halicarnassus tells us that there was a statute to that effect and that it was because he had violated this law in dividing among the soldiers the booty taken from the Volscians, more than for any other reason, that Marcius Coriolanus was condemned by the people. And that is the point, too, of St. Ambrose's remark, that it is an injunction of military discipline to deliver up to the king everything that is preserved, following the example of Abraham, who made over all his spoil to the king of Sodom.

c. 25, C. 23, qu. 5.

Cod. 8, 53, 36. [4] It is clear, however, that in later times at Rome all booty was at the disposal of the general and that is abundantly shown by several passages in Livy. Thus he tells us how the Phocæans opened their gates and surrendered themselves to the Romans, on the faith of an undertaking that they should receive no hostile treatment; nevertheless the soldiery went off in different directions for the purpose of sacking the city; thereupon Lucius Æmilius withstood and called the soldiers back saying that it was captured towns and not surrendered towns that could be sacked, and declared that these matters are under the control of the general, not the soldiers.

Livy, bk. 37.

Elsewhere Livy describes how Camillus sought the advice of the Senate at the time of his siege of Veii. He saw that victory was within his grasp and that, consequent on the capture of so rich a place, there would be more booty than in all other wars put together. Now he shrank from incurring either the anger of the soldiers, should he be nig-

gardingly in his division of the booty, or the jealousy of the Senators, should his division be too generous; so he referred the matter to the Senate. Livy, bk. 5.

[5] Now commanders sometimes send the whole or a portion of the booty to the treasury through the quæstors. Thus Lucius Furius, prætor, when celebrating his triumph over the Gauls, brought into the treasury 320,000 pounds of copper and 170,000 pounds of silver. Cic., Epist. 27. Marcus Helvius and Quintus Minucius, too, brought into the treasury an enormous mass of silver and gold out of their Spanish booty; so did Titus Quinctius, after the overthrow of Philip; and so, to a much greater amount than the rest, did Lucius Æmilius Paulus, after the overthrow of Perseus. Livy, bk. 31. And Camillus, the general who scattered the Falisci, and took their camp, turned over the whole of his booty to the quæstors, thereby rousing no small anger in his soldiers, who, overborne by the severity of their commander, both detested and marvelled at this virtue (in Livy's words): and in different passages of Livy the account may be found of the payment into the treasury of large sums of silver and gold, being booty taken from the enemy. Livy, bk. 34.

[6] Sometimes commanders sell the booty and divide the price among the soldiers, with a preference in favor of those whose bravery in the war had been the most conspicuous and with due regard to the rank and dignity of each participant. Thus Julius Cæsar promised in Gaul to give by way of booty to each soldier 200 sesterces in return for their toil and endurance (for they were indefatigably constant in toil in wintry days, on most arduous marches, and under intolerable cold) and 2000 sesterces to each centurion. A. Her., on Gallie war, bk. 5. And out of the booty taken by Lucius Æmilius Paulus, on the overthrow of Perseus, each foot-soldier received 100 denarii, and each centurion twice, and each horse-soldier thrice that amount. Livy, bk. 45.

Marcus Valerius Corvinus, after his defeat of the Samnites, and Caius Junius, after the capture of Bovianum, gave all the booty to the army. So did the Senate in the case of the booty taken from the towns of Epirus which had defected to Perseus. Livy, bks. 7 and 9. And so (says Livy) after the word had been given to sack the towns, the booty was so vast that each horse-soldier received 400 denarii as his share and each foot-soldier 200. Bk. 45. And such division of the spoil is held lawful.

It is recorded in Holy Scripture, too, how the Lord commanded Moses that he and Eleazar should take "the sum of the prey that was taken" from the Midianites whom the Israelites had conquered and should divide it equally "between them that took the war upon them" and that a fiftieth part should be given to the Levites "which keep the charge of the tabernacle of the Lord." c. 10, Dist. 1. Cod. 8, 53, 36. Bartolus on Dig. 49, 15, 28. Sp. Ordin., bk. 1, 17, 19 and 20, tit. 26, par. 2.

[7] And after David had beaten Amalek in battle, he gathered together all the spoil, and they who had been present in the battle claimed that it should be divided among themselves alone without anything going

Num. 31.

to those who had not been with them there, but David said that they should share equally, both those that went down to the battle and those that tarried by the stuff; and from that day forward that was a statute and ordinance for Israel. The same ruling occurs in the constitutions of the Kingdom of Spain. This is also the explanation of the conduct of Caius Fabius Ambustus, military tribune: At the time when he marched to the storm of Anxur, his colleagues, Cnæus Cornelius Cossus and Valerius Potitus, had gone with a part of the army on a ravaging expedition in order to draw off the Volscians; so after he had captured the town he kept his troops back from plundering it, until the arrival of his colleagues and their troops, for he said with emphasis that they too had taken Anxur, in that they had prevented the rest of the Volscians from aiding in its defense.

1 Sam., c. 30.

Span. Ordin., bk. 25,  
tit. 26, par. 2.

Livy, bk. 4.

[8] Lastly, commanders sometimes rouse the zeal of their men by decreeing the whole booty to them before an engagement, each man being allowed to keep whatever the fortune of battle has put in his way; this is what the Senate decided with regard to the booty of Veii, in accordance with the opinion of Publius Licinius, to the effect that it would be more agreeable and pleasurable for each to take home with him what he had seized from the enemy with his own hand than to obtain many times as much on the award of another: this decree was made, however, with the dissent of Appius Claudius, who blamed the liberality as novel, lavish, inequitable, and ill-advised. So far, then, regarding the things which are acquired in actual fighting: it is otherwise with regard to enemy property which comes into one's hands apart from any struggle; this becomes his who first obtains possession of it.

Livy, bk. 5.

Dig. 41, 1, 51; and 41,  
2, 1, pr.

c. 10, Dist. 1.

Span. Ordin., bk. 4,  
tit. 26, par. 2.  
Bk. 19, tit. 26, par. 2.

Span. Ordin., bk. 14,  
tit. aforesaid.

Span. Ordin., bk. 29,  
tit. aforesaid.

Span. Ordin., bk. 30,  
tit. aforesaid.

[9] Again, even when booty is granted to the soldiery, the prince is none the less entitled to his share. By the constitutions of the Kingdom of Spain this share is one-fifth, at times one-third, and at other times one-half; the same constitutions give one-seventh to the general, at times one-tenth. But if it chance that in a naval war the king supplies the ships and their armament and also provides supplies and wages for the soldiers and sailors, the same constitutions place the whole booty at the disposal not of the general or admiral but of the king, nor will the soldiers or sailors get any part thereof, except such as is granted to them by the king's liberality. In every other event, however, after the king's share has been set aside, the admiral can divide the residue between the soldiers and sailors, a seventh part of that residue being due to him himself.

Span. Ordin., bk. 20,  
same tit.

Livy, bk 5.

[10] Furthermore, the Romans were wont to secure victory by vowing a portion of the spoils to their gods; and so Camillus, at the outset of his attempt to destroy the town of Veii, vowed a tithe of his spoil to Delphic Apollo.

[11] And we must not omit to call attention to the rule of military discipline which forbade, under the severest penalties, the quest of booty

save after the enemy had been routed and his camp taken and his fortress or town completely reduced to submission, and not even then unless the commander had given the signal, notwithstanding that before the battle he had proclaimed that the booty should belong to the soldiers. The object of this rule was to prevent the greed of booty giving the enemy (as often happens) a chance to slip out of one's hands or to renew the engagement. This actually happened in the case of the Samnites. They had fought with the Romans on equal terms far into the night and at last were led by the greed of booty to make an attack on the Roman baggage-trains (which were stationed at some distance from the fighting force without a guard or defense); but they were scattered by Marcus Fabius, the master of the horse, acting under the orders of Cornelius Arinna, the dictator, and owing to their being encumbered with baggage they were miserably slain, yielding up the victory to the Romans.

Livy, bk. 8.

Besides, the common experience is, as Appius Claudius used to say, that the more backward the looter is kept, the more forward is every one wont to be in taking his share of toil and danger. And so at the taking of Veii, though the Senate had granted the spoil to the army, yet the quest of the booty was not allowed until the dictator, Camillus, had given his permission. It was just the same with the booty of the towns of Epirus, which had defected to Perseus. The Senate had given it to the army, but the signal for sacking the cities had to be waited for. And at the storming of Nova Carthago, when at last the fortress fell and the signal had been given, then the victors directed themselves towards the booty. And, accordingly, the provision in the constitutions of the Kingdom of Spain is a very proper one, that any one who goes after booty before the enemy has been completely routed loses his share of the booty and has to pay a fine of double that amount and is put to a worse form of military service. And indeed if, through the fault of looters, the enemy are enabled to renew the fight and thus conquer or slay the king, these looters meet with the same punishment as if they were themselves directly guilty of those things.

Livy, bk. 5.

Livy, bk. 45.

Livy, bk. 26.

Span. Ordin., bks. 2, 3, 19, tit. 20, par. 2.

[12] He, again, who commits fraud in division of booty is by the same constitution subjected, by way of punishment, to a fine of double the amount and to loss of his share. But he who pilfers booty taken from the enemy is within the law against peculation and liable to a four-fold penalty, according to a response of Modestinus.

Dig. 48, 13, 15.

[13] Those, however, who have fled from battle or have been cowardly or slack, have no claim to a share of booty.

Baldus on Cod. 8, 53, 36 and Dig. 49, 16, 6, 3. Span. Ordin., bk. 1, and bk. 20, tit. 26, par. 2.

Accordingly when Lucius Quinctius Cincinnatus, the dictator, freed Lucius Minucius and his army from the besieging Æqui and captured the enemy's camp (which was fitted out with everything needful) he gave the whole of the booty to his own force only and upbraided both the army of the consul and the consul himself in these terms:

“ You, my men, will have to do without any of the spoil of that enemy whose spoil you were so near becoming; and you, Lucius Minucius, until you begin to have a consul’s courage, it will be as my legate that you shall command these legions.”

[14] Now, seeing that nothing irks or weakens an army more than a mass of baggage, it will be very conducive to military discipline to order the soldiers to sell all their booty: Publius Decius gave an example of this when, after storming several towns in Samnium, he forced his soldiers to sell all their booty at the first opportunity, so as not to burden the marching column with heavy baggage.

[15] Be it remarked that *res sacræ* are not liable to be seized as booty: for, as they are no one’s property [*res nullius*], they can not be said to belong to the enemy and it is only enemy property that is capturable as booty; and that which is *divini juris* (as the emperor says) is not the property of any individual and is not subject to the power of man. And so he who lays forcible hands thereon will be punished under the *Lex Julia* for sacrilege according to his rank and to the character of the thing. Wherefore, after the destruction of Carthage (which was accompanied by a grant of booty to the soldiery), Scipio distributed a large number of rewards and gifts among the soldiers, but he excluded those who had looted and had violated the shrine of Apollo.

Now there was a controversy in olden days whether it was sacrilege to take a privately owned article which had been deposited in a temple: the emperors Antoninus and Severus, however, declared in a rescript that the action on theft would be given and not the action on sacrilege and therefore the article in question must be held seizable as booty. But Cicero in his *De Legibus* draws no distinction between an article which is *sacer* (holy) and one which is intrusted to a place which is *sacer*. And our canons take the same view. Now, however true this may be as between citizen and citizen, I do not think it holds good in the case before us. An article intrusted to a place which is *sacer* can not be taken to become *sacer* itself, for this involves its being a *res nullius* (i. e. no one’s property). As, therefore, the article in question is not a *res nullius*, but belongs to a private person, and he an enemy, I hold that it may be seized as booty. In order that this may be so, it is enough for it to be an enemy’s.

Again: our remarks about things captured in a just war apply also to free persons so captured. This is a doctrine both of the law of nations (*jus gentium*) and of the civil law; they become the slaves of their captors and are no longer persons but things subject to ownership. This is the origin of slavery.

[16] There is in truth an old-standing discussion among philosophers, whether this division of persons into freemen and slaves is a feature of our society which is of natural origin or of human institution:

Aristotle's view was that it was of natural origin, but our jurists affirm that slavery is against nature and belongs to the law of nations (*jus gentium*), seeing that by natural law all were born free in the beginning and that by nature all men are equal, a proposition which is approved also by Cicero, for (says he) no two things are so identical, so similar to one another, as we men are to each other. The doctrine of the jurists is not, however, free from difficulty, because the law of nature is immutable and the *jus gentium* can not derogate from it. Moreover it seems unjust and repugnant to nature for men to be slaves to men, though possibly expedient in the interests of the State, an argument on which some ancient thinkers relied very much in days gone by when attempting to defend the commonly stated proposition that a State can neither exist nor develop without injustice. And Cicero represents Philo as carrying on a discussion of these matters and as receiving an excellent and final reply from Lælius, referred to in the preface hereto where we showed that the reduction to slavery of prisoners of war is not unjust.

Note also, as aiding in the solution of the problem, that liberty is an institution of the law of nature, in that before the development of the *jus gentium* all men were born free and were reckoned each other's peers and equals—not, however, that the law of nature has any precept on the subject or that it forbids slavery. But the *jus gentium*, which has its basis in natural reason, introduced war and slavery. For, as man's wickedness increased, right natural reason—and there is nothing diviner than it; it is in virtue of it that we are superior to the beasts—taught that this wickedness of man ought to be restrained by war and captivity and slavery.

In the same way, under the law of nature, in that primitive time which pagans used to call the Golden Age, all things were in common and nothing belonged to any individual, but in following ages it was found that community of goods was not adapted to man's debased nature and so the *jus gentium*, under the guidance of natural reason, developed the system of private ownership and all the differences incidental to it. Community of goods, therefore, equality of men, one and the same freedom for all—these suit the blameless primitive time and Plato's ideal republic far better than they suit the iron age. They are therefore condemned by the *jus gentium*. Slavery, then, was unknown to the law natural—according to which all men were born free and reckoned each other's peers and equals; yet it was left open to the *jus gentium* to develop slavery and to introduce the doctrine that prisoners captured in a just war become slaves—and this all the more so because of its utility to the State as a means of repressing those who wage unjust war. That same reason, accordingly, which permits war enjoined the introduction of slavery. And to this effect are the following remarkable words of St. Augustine:

Polit., bk. 1, ch. 1.

Instit. 1, 3, 2 and 1, 2, 2 (latter half).

Dig. 50, 17, 32.

Instit. 1, 2, 2, at end.

In Republic.

Dig. 1, 1, 4.

Dig. 50, 17, 2.

Thom. Aquin. 1, 2, qu. 94. Art. 5. Fraep., c. 9, Dist. 1.

c. 8, Dist. 35.

Dig. 1, 1, 5.

Dig. 1, 1, 4; and 50, 17, 2.

Kingdom of God, bk. 19, ch. 15.

Dig. 41, 2: 3, 5 and 7. Instit. 1, 2, 2, latter half.

“Justly was the burden of servitude laid upon the back of transgression. So that it was guilt and not nature that gave its origin unto that name.”

And then he adds:

“But take a man as God created him at first, and so he is neither slave to man nor to sin. But penal servitude had its institution from that law which commands the conservation and forbids the disturbance of nature’s order; for, if that law had not first been transgressed, penal servitude had never been enjoined.”

Consistent herewith is the apostolic injunction to servants to be obedient to their masters and to do their service with good-will; and Canaan was for his sin declared a slave by his father Noah and made a servant of servants unto his brethren. The same apostle, however, recommends masters not to insist too strongly on their rights and in certain matters he declares that all men are on an equality.

[17] It must also be borne in mind that the freedom which this enslaving of persons does away with is not that natural freedom which consists in action (for a slave, however much his master may order, may refuse to enter on an inheritance), but that which results from certain matters of law and is an institution of the *jus gentium*.

[18] No mere force, which is matter of fact, can create slavery, which is matter of law. For captives other than those made so in just war do not become slaves—not those made by brigands or robbers or by those who are not “just” enemies.

[19] And indeed there has grown up in the Christian world a laudable and long-established custom that the prisoners on either side, however just the war, are not enslaved, but they are kept with their freedom intact until payment of ransom (Greek *λύτρον*). Romulus, in truth, with intent to add to the size of his State and to make it big instead of little, forbade the slaughter and even the sale of prisoners taken in war, and he settled Roman colonists on portions of the enemy soil and gave to many conquered peoples the rights of citizenship.

If, however, any Christians fight on the side of Saracens and infidels against fellow-Christians, or render them any aid whatever, then, should they be taken prisoners, they will be enslaved and they are by the fact itself excommunicate, for by that time they are no longer to be classed among Christians, but among the infidels, to whom they have allied themselves. They may not, however, be sold to others than Christians. But if the war be with infidels and pagans, then indeed the condition of the prisoners taken on each side will be that which is fixed by the civil law for prisoners taken by the enemy. This is decided by the constitutions of the Kingdom of Spain. And so the fictions of the *Lex Cornelia* and of postliminy will be in operation. Now how inexpedient and charged with danger to the State it is to increase the number of slaves,

Ephes., ch. 6. 1 Tim.,  
ch. 6. Tit., ch. 2.  
Coloss., ch. 3.

Genes., ch. 9.

Gal., ch. 5.  
Ephes., last ch.  
Coloss., ch. 4.

Cod. 6, 24, 3.

Dig. 1, 1, 4.  
Instit. 1, 2, 1.  
Dig. 48, 19, 17.

Dig. 49, 15: 19, 2; and  
24; and 32, 1, pr.;  
and 28, 1, 13.

Boerius, Decis. 178.  
Baldus on Dig. 49,  
15, 24. Alciat. on  
Dig. 50, 16, 118.  
Span. Ordin., bk. 1, tit.  
29, par. 2.

Dion. Hal., Rom.  
antiq., bk. 2.

c. 6 and c. 17, X, 5,  
6. Span. Ordin., bk. 4,  
tit. 21, p. 4 and bk.  
9, tit. 29, part 2.  
Leading text in Dig.  
48, 8, 3, 6; and 49, 16,  
7; and 41, 1, 51.

Span. Ordin., bk. 2,  
tit. 21, par. 2.

Span. Ordin., bk. 9.  
Cod. 1, 10 (?).

Alciat. on Dig. 50, 16,  
118. Claud. Cant. on  
Instit. 2, 1, 17. Covar.  
on c. 6, Reg. jur., in  
vi, 2 par. relect. §11.

is shown by the frequent servile wars and plots which at different times vexed the Roman State and led to the bitterest conflicts. Bodin demonstrates this at length.

Repub., bk.1, ch. 5.

[20] Further, suppose that free persons, who have been made prisoners of war and reduced to slavery, succeed in returning to their own country—whatever may be the manner in which they have got out of the enemy's hands, they regain their original liberty, just in the same way that wild animals cease to belong to their captor if they make good their escape from him.

Dig. 49, 15, 26.

[21] Further, captives who have returned from the enemy reacquire every right which they had forfeited by their captivity: and this is owing to the law of postliminy; but that is not the case if they have given their parole to return to the enemy or not to depart from him, for those who have returned to their own country in such circumstances can not be said to have returned by postliminy, as was held in the case of Attilius Regulus and those whom Hannibal sent to the Senate after the defeat of Cannæ under an oath to return to his camp if they failed to obtain ransom. For it is not enough to have returned to your country *corpore* (i. e. physically) unless you do so also *animo* (i. e. with intent to remain there), and so in the case of those who only came home with an intent to return to the enemy there was no postliminy.

Instit. 2, 1, 12.  
Dig. 41, 1, 5.

Dig. 49, 15, 19, pr.

Dig. 49, 15, 5, 3.  
Span. Ordin., bk. 9, tit. 29, par. 2. Cic., Offic., bk. 3.

Dig. 49, 15, 26.

[22] A deserter also has no rights of postliminy, for (to quote Paulus) one who has abandoned his fatherland with the foul plan and intent of a traitor, must be deemed an enemy, and this is so alike in the case of female or male, of *filiusfamilias* or *paterfamilias*. Accordingly a paterfamilias did not by postliminy regain a son who had deserted, because the father had lost him (again to quote Paulus) in the same way as the State did and because military discipline was esteemed a greater thing by Roman parents than their love for their children. The case is different with a slave deserter, for the master has rights by postliminy over him, since a rule to the opposite effect would not so much be injurious to the slave as hurtful to the master.

Dig. 49, 15, 19, 4.

Dig. 49, 15, 19.

Dig. 49, 15, 19, 4.

[23] It must be remarked that postliminy may apply to all, whatever their sex, age, or rank, but, in order that it may apply in the case of soldiers, they must prove that they were captured fighting, there being no postliminy in the case of those who surrendered to the enemy after defeat and with arms in their hands. For the Romans deemed it most shameful to fall into the power of the enemy by surrender and not by superior force. The Senate, accordingly, refused (though they had the opportunity) to ransom the 8,000 Romans who had surrendered to Hannibal after the defeat of Cannæ but who had been captured in the camp where they had been left and not in the fighting line—the intent being to implant in the Roman soldier that he must either conquer or die. We shall have more to say on this topic later.

Dig. 49, 15, 19, at end.

Dig. 49, 16, 5, 6.

Dig. 49, 15, 19.  
Span. Ordin., bk. 9,  
tit. 29, par. 2.

Livy, bk. 22.  
Cic., Offic., bk. 33.

Bk.iii, ch. 15, post.

A soldier who has been made prisoner and who returns with postliminy can not, however, claim pay and largess for the time of his captivity. The Emperor Antoninus ruled this in a rescript. If, however, he be captured by the enemy after the completion of his period of military service and then return, he is entitled to his veteran's rights and pension, according to a response of Arrius Menander. There was a difference of opinion between Brutus and Scævola on the question whether those re-acquire their former status who return home after having been surrendered to the enemy by the *fecials*, pursuant to a decree of the Senate or an ordinance of the people.

Cod. 12, 35, 1.

Dig. 49, 16: 3(10),  
and 5.

[24] This was the issue in the celebrated case of Mancinus. He had made peace with Numantium in improper fashion; the Senate decreed his surrender to the enemy; they would not accept him. A question then arose whether he continued to be a Roman citizen, there being some who thought he did not. Thereupon a tribune of the plebs, Publius Rutilius, the son of Marcus, ordered his expulsion from the Senate-house, into which he had not scrupled to enter after his return. Rutilius did this on the ground that he was no longer a citizen, it being a matter of long tradition that there was no postliminy for one whom either his father or the people had sold or whom the *paterpatratus* had surrendered. And it was taken to be immaterial that the enemy had refused to receive Mancinus, he ceasing to be a Roman citizen whom the State has repudiated, whether the enemy has accepted him or no, just as in the case of one interdicted of fire and water, or proclaimed an enemy, or deported to an island. And this seems to be supported by the dictum of Marcellus that a prisoner of war who returns is not a citizen unless received as such by his fellow citizens.

Cic., Orator, bk. 1.

By inference, Dig. 41,  
2: 1(4) and 18(1).

Dig. 4, 5, 5, 1.  
Instit. 1, 16, pr.  
Dig. 49, 15, 4.

Topic. and pro  
Caecina, at end.  
Dig. 39, 5, 10 and  
Cod. 8, 53, 6 and  
Dig. 41, 2, 34.

Dig. 50, 7, 18.

There was, however, a party that held that, as Mancinus had not been accepted by the enemy, he remained a citizen. This view was approved by Cicero, on the ground that a person is not surrendered who is not accepted, surrender being like donation and requiring acceptance. We read in Pomponius, however, that by subsequent statute Mancinus was declared a Roman citizen. This seems to show the soundness of the opinion of Modestinus, that one whom the enemy would not accept does not on return become a citizen unless received as such, for otherwise what need would there have been for any statute about Mancinus?

[25] Again, in war not only men but women also may be taken prisoners. Thus we read that the wife of Darius and his mother and his whole family were captured by Alexander; Sophonisba, the wife of Syphax, by Masanissa; and Cleopatra by Augustus. Scipio, however, won for himself throughout Spain a great reputation for clemency when, after the capture of Carthage, he freely restored, unharmed, the lovely bride of Allucius, prince of the Celtiberians, who had fallen into his hands.

Cod. 8, 50: 1, 7, 8, 9  
and 16.  
Dig. 49, 15: 6 and 8.

Livy, bk. 26.

Nor are the young exempt from capture in war, although Camillus set a praiseworthy example in the case of the young nobles of Falisci. Their schoolmaster had craftily brought them into Camillus' camp. Camillus, however, did not take them, but stripped the traitor and turned him over, with his hands tied behind his back, to the youths to be beaten and led home, saying, "There is no alliance between us and the Falisci such as is made by human agreement, but there is and will be one of nature's making. There are laws of war just as there are laws of peace. We bear arms, not, however, against those who are so young as that they would be spared even on the storming of a town, but against warriors." This moderation so stirred the Falisci that they surrendered to the Romans of their own accord.

Dig. 48, 6, 28; and 49, 15: 10 (pr. and 11).

Livy, bk.

Of course, severity towards women and the young was always reckoned very disgraceful, their very sex and age exempting them from the hazards of battle and the rage of the conqueror. It is accordingly a precept of the divine law, given to the Jews, to slay all enemies who resisted and who would not make peace, but that the women and the little ones were to be taken as spoil and made slaves. The canons indeed contain an injunction that the following be spared: clergy, monks, converts, foreigners, merchants, and country folk, but this (says Panormitanus) has been abrogated by contrary usage. I do not think, however, that it has been abrogated as regards the clergy, upon whom it is forbidden to lay hands under penalty of anathema—unless indeed they take active part in the war, for he who misuses a privilege loses it.

Deut., ch. 20.

c. 2, X, 1, 34.

Ibid.

c. 29, C. 17, qu. 4.

c. 7, Dist. 74 and c. 14, X, 5, 19.

It deserves notice, too, that when war breaks out between two countries, those of the enemy who are found on the soil of either country may be made prisoners despite the fact that they came there in time of peace, and in olden days they would have been made slaves.

Dig. 49, 15, 12, pr.

[26] Now a prisoner made in just war who has promised a reasonable price for his ransom can not claim discharge from his obligation by alleging that he gave the promise under fear and duress, for the edict of the prætor, under which duress is a ground of rescission, does not apply to that kind of duress which is legally imposed. Besides, what we have here is not so much a case of promise of a price under duress as of release from the fear of justly imminent death by means of that promise; and this is especially so where the ransom-price has taken the place of slavery.

Leading text in Dig. 4, 2, 21 pr. Panormitan. on c. 2, X, 1, 40, col. 3, and c. 6, X, 1, 40. Felinus on c. 5, X, 2, 25, nu. 20. Domin. on c. 4, Dist. 5, last col. Sylvest., on word Metus, qu. 6.

Fort. on Dig. 2, 14, 5; and 3, 5, 20.

[27] Now as regards the acquisition of ownership in prisoners of war, the same holds good as with other booty of things movable, i. e., it is subject to the discretion of the general, and Dionysius of Halicarnassus is a witness that this was the former practice, but it is more usual nowadays to grant prisoners of war (like other movables) to their actual captors, unless the ransom happen to exceed the sum of 10,000 crowns, as where the prisoner is a duke or count or baron or other person of note. By the long-standing practice of Spain and France and England these

Rom. antiq., bk. 5.

latter belong to the king, and the chance of ransom ought not to be denied them, not even when the prisoner is the commander-in-chief, unless further disturbance of the peace is apprehended as the result. For (in the language of St. Augustine) just as violence is the lot of those who fight and resist, so, after a victory, mercy is at once the prisoner's due. On this principle (says Cicero) our forefathers made the excellent rule that none should kill a king who had been made prisoner of war, because it would be improper to waste the opportunity which fortune has put in our way in the punishment of those who, but a little while before, owed a splendid position to the same fortune.

But there ought to be no respite for a man so capable that there would be a grave risk of his breathing new vigor into the war; that view of Ferrandus the deacon, when he was writing to Count Reginus on the subject of the duty of a pious Christian general, for he included among the seven rules of innocence which he enjoined on generals, this: "Do not be over just." And so it was a practice among the Romans for a general when celebrating his victory with triumphal pomp to turn aside from the forum into the capitol and to order those prisoners of high rank, who had sown the seeds of discord and who were responsible for the war, to be cast into gaol and put to death at the close of the triumph.

[28] In other circumstances, however, it is not allowable for any private person on his own authority to kill a prisoner, nor to treat him with great severity, since it was not allowed, even in the olden days when prisoners of war were enslaved; for the civil law included among the limitations which it imposed on the power of a master this: that he was only allowed to kill his slave if he detected him in a deed for doing which a freeman might, if detected, have been killed; in other cases a master might not kill his slave, but only inflict on him a moderate degree of chastisement. And a rescript of the Emperor Antoninus protected slaves against excessive severity and intolerable cruelty on the part of their masters. There was a corresponding constitution of the Kingdom of Spain as regards prisoners taken on either side in a war between Christians (but not in a war between parties of differing religious professions).

[29] Again, if a bargain about ransom has once been concluded between a prisoner of war and the person who holds him captive, the terms of the bargain can not subsequently be stiffened (say) on the ground that the latter has ascertained that the former is a person of such and such a family and wealthy, and any subsequent bargain will be invalid and the earlier one will be substituted for it. This is the principle on which the following response of Paulus is founded: "One ransoms a prisoner of war from the enemy and then transfers to a third person

Bartol. and Bald. on Dig. 3, 5, 20.  
Joa. de Ana. on c. 21, X, 2, 1, in not. Boer. decis., 178.  
Span. Ordin., bk. 5 and 8, tit. 26, par. 2.

Cic. to Herenn. bk. 4.

Offic., bk. 1, and c. 33, C. 23, qu. 4.

Alexand. ab Alexand., Genial. dies, bk. 6, ch. 6.

Dig. 48, 5, 25; and 30, 53, 3.

Cod. 9, 14.

Dig. 1, 6, 2.

Span. Ordin., bk. 1, tit. 29, par. 2.

Guid. Pap., qu. 113. Papon. in Arrest., 5, 6, pr.

c. 3, C. 23, qu. 1, at end. Ibid.

for a greater sum the lien which he has over the person ransomed: the person ransomed only owes the ransom-price and not the greater sum." Dig. 40, 15, 19, 9.

[30] He, moreover, who has paid or has undertaken to pay the ransom price in order to procure freedom for a prisoner of war, not only has the *actio negotiorum gestorum* (i. e. the action to recover money spent on another's business)—and this whether the captor was or was not a "just" enemy—but he also has a lien over the ransomed person until he be repaid, and he is not fettered by the interdict *de libero homino exhibendo* (i. e. ordering production of the freeman); nor does the person ransomed regain his original status until he has paid or tendered the amount of the ransom, but he does not become a slave nor did he in the olden days when slavery existed in some places. And, as a privilege arising from his status of freeman, he will be able to assert his rights of succession so that he may be able to pay out of the succession the price that has been given for him; and his son has rights of succession to him, even if his death occur before he discharges himself; nay, by his death the person ransomed is freed from his ransomer, the lien being (so to say) determined and the result is that his heir and any surety are under no obligation to pay the ransom-price. And although we admit that the issue born of things which are subject to a charge is fettered by the same obligation, yet the emperors declined to allow that issue born to a prisoner after his ransom was subject to the lien. Leading text in Dig. 24, 1, 28. Covarruv. on c. 4, X, 4, 1, 2 par. c. 3, §4, nu. 14. Dig. 43, 20, 3, 3. Cod. 8, 50, 17. Cod. 8, 50, 2. Cod. 8, 50, 15. Dig. 49, 15, 15; and 38, 16, 1, 4. Dig. 20, 1, 13. Cod. 8, 50, 8.

Now what has been said holds good of freemen captured by the enemy and ransomed, but slaves captured by the enemy and ransomed become the slaves of him who ransoms them; when, however, the price which he has given is proffered to him they are taken to have returned or been received back with postliminy. Dig. 49, 15, 7.

[31] Again, the ransoming of prisoners is viewed with such favor that a gift towards this purpose, however big it may be, is irrevocable and need not be registered; and although not even a soldier may make a bequest to an uncertain person, yet the emperors, upon duteous grounds and out of pity for the sufferings of prisoners, ruled that a legacy for the ransom of prisoners—even of the whole of the testator's fortune—is valid despite the uncertainty of the persons. And when a prisoner has been ransomed upon duteous considerations, e. g., a son by his mother, it is not seemly to discuss about claiming back the price, but a gift is presumed, and one who ransoms a maiden out of wantonness or who prostitutes her, loses the ransom-price and the maiden can escape from him without punishment. Cod. 8, 53, 36. Instit. 2, 20, 24. Cod. 1, 3, 48. Cod. 1, 3, 28. Cod. 8, 50, 17, 1. Span. Ordin., last bk., tit. 29, par. 2. Cod. 8, 50, 7.

[32] Also neglect by a child to ransom his father is a good ground for his exheredation, and, by a statute, instituted heirs who neglect to ransom a prisoner lose their rights in that person's succession, and the succession goes to the Church to be devoted to the ransom of prisoners. Authentica. Si captivi, Cod. 1, 3, 49 (Nov. 115, 3, 13). Span. Ordin., bk. 3, tit. 29, par. 2.

Cod. 8, 50: 2 and 17.  
Dig. 30, 43, 9; and 28,  
1, 20, 1; and 49, 16, 8

We have stated that postliminy applies to prisoners whether free or slaves, and whether male or female; let us now consider the other things which return with postliminy, and when we have found out what these are we shall know what the things are to which postliminy is inapplicable.

Topic. For (as Cicero says) the force and characteristic of contraries that negative each other is this: that when one is found to be present the other is at once known to be absent, and when one is ascertained the other is ascertained also.

Text in Instit. 1, 8, pr. and Dig. 32, 103, 3 (?), and Bartol. thereon.

[33] Well, land and the usufruct thereof are other things which revert by postliminy. If an enemy has been driven away from land which he had taken, the former owners reacquire their ownership in it, and any usufruct which existed over it is set up afresh. Paulus has a response to this effect, with which I fully agree. This doctrine holds good, no matter how great an interval of time has elapsed; and so when the town of Saguntum, which had been in hostile occupation for over seven years, was at last retaken, it was restored to such of the former inhabitants as had survived the stress of the war. And a constitution of the Kingdom of Spain provides that empires, kingdoms, earldoms, and other greater dominions revert by postliminy if they are recovered from an enemy and that a title to them can not be based on usucapion, not even reckoning from the day of their recovery; but other smaller dominions are subject to prescription if the owner does not appear for four years after their recovery, unless indeed he be a minor. The same constitutions enact that if any subject by his own fault loses a fortress, even his own, and the fortress is recaptured, it must be handed over to the king on his demand, even though the recapture was due to the exertions of the former owner.

Dig. 49, 15, 20, 1; and 7, 4, 23; and 1, 8, 6 pr. c. 13, C. 16, 4 and gloss thereon. And Cod. 3, 28, 16.

Livy, bk. 24.

Span. Ordin., bk. 10, tit. 29, par. 2.

Span. Ordin., bk. 32, tit. 28, par. 2.

[34] Lastly, large vessels and transports may revert by postliminy. Marcellus gave a response to this effect and he also was of opinion that a horse and a mare that had been broken in were recoverable by postliminy, because they might bolt without any fault of the rider. And Cicero's evidence agrees herewith, for he says, "The following things may revert by postliminy: men, ships, mules, beasts of burden, horses and mares that have been broken in." Arms are not in the list, they do not revert by postliminy because they can not be lost without blame. More will be said on this point hereafter.

Dig. 49, 15, 2.

Topica.

Dig. 49, 15, 2.

Bk. 3, ch. 16.

[35] And now (unless I mistake) we are naturally brought, by what has been already said, to a question which in different ways has proved exceedingly troublesome to nearly all commentators. I refer to the well-known question whether things captured by the enemy and then recaptured from them ought to be restored to their former owners, or not. Some say, aye; some say, nay; others foolishly divide and subdivide, to the satisfaction neither of themselves nor of any one. Some there are who draw a distinction between movables and immovables and

Dig. 49, 15, 20, 1. hold that the latter must always be restored and the former never. There are others who distinguish immovables recovered by an exploit of war—which they would refuse to restore—from immovables ransomed under a bargain, which they would allow to revest in the former owner on his tendering the amount of their ransom.

By inference, Dig. 49, 15, 28. Ang. Salic., Jas. Mart., Laud. and others whom Covarruv. mentions, on c. 4, Reg. jur., in vi, 2, relect. §11.  
By inference, Cod. 8, 50, 2. Dig. 49, 15, 12, 7. Franc. Ripa on Dig. 41, 2, 1. Covarr. in place named and others cited by him. By inference, Cod. 8, 50, 2. Dig. 30 and 41, 1, 44. Joh., Andr., Alex., Pyrrh. and others mentioned by Covarr. on c. 4 Reg. jur. in vi.

Lastly there is a school which declares that all recaptured property, movable or immovable, without any distinction, ought to be unconditionally restored to the former owner—and this despite the unmistakable opinion of Labeo, who says in one place: "Whatever is captured in war is booty and does not revest by postliminy"; and in another place: "What has been captured by the enemy and then recaptured by our side, only reverts by postliminy if it be of a kind to which postliminy applies."

Marcellus approves this distinction. And the school in question ignores this point, that slaves recaptured from the enemy are (pursuant to the imperial rescript) to be restored to their former owner, precisely because there is postliminy—not only in the case of freemen, but also in the case of slaves. And, so, the response of Octavenus, affirming that property in the enemy's hands can be bequeathed and is subject to postliminy, must undoubtedly be understood as referring only to property of a kind which admits of postliminy, in accordance with the distinction drawn by Labeo.

In Dig. 49, 15, 28.  
In Dig. 49, 15, 30.

Dig. 49, 15, 2.

Cod. 8, 50, 2.

Dig. 30, 9.

Dig. 30, 9.

[36] Note also that, though enemy property is not a subject of transfer (*in commercio*), yet things which the enemy has captured may, if of a kind which admits of postliminy, be sold and bequeathed or

Bk. 25 alienated in any way whatsoever. Livy furnishes us with an example of the operation of this principle. When Hannibal had got as near to Rome as the fourth milestone, he heard that the very spot on which his camp was pitched was selling at exactly the same price as before his arrival; this enraged him so much that he had a herald fetched and bade him announce the sale of the silversmiths' shops in the forum at Rome; now the sale of the land was perfectly valid because of the chance of postliminy, but the sale of the shops was invalid because they had never been the enemy's and there was no postliminy as regards them.

Dig. 45, 1, 103.

Dig. 10, 2: 22 and 23 and 30(9).

Dig. 10, 2, 22.

Dig. 45, 1, 103.

And I do not think that the question is affected by the citation from the Digest (*de acq. rer. dom.*)\* of the passage in which Pomponius deals with the case where wolves carry off my swine from my herdsmen and a neighboring farmer follows them up with stout dogs and rescues the swine; the jurisconsult laid it down that the swine do not become the farmer's but remain mine, as long as any one could have recovered them, and he distinguishes the case where my neighbor by the same means deprived me of some wild animal, seeing that a wild animal ceases to be ours if it passes out of our control and it becomes the property of the captor.

\* Dig. 41, 1.

This passage, I repeat, does not affect the question; for, in it, Pomponius expressly says that swine and other tamed animals remain ours, even though carried off by a wolf, as long as they can be recaptured, just like goods lost in a shipwreck; and he says that an action on theft would lie on these facts; but the case of property taken from us by the enemy is entirely different, for it is incontestable that the ownership therein passes immediately to the enemy. It is, accordingly, a better parallel to say that just as we lose our ownership of a wild animal when it passes out of our control, and the animal becomes by *occupatio* the property of any subsequent captor, so it is with things captured by the enemy: we immediately lose our ownership of them and they become his who retakes them and the former owner has no claim for restitution, unless they are of a kind which admits of postliminy.

And this is fatal to the doctrine that all movables without distinction become the property of those who rescue them from the enemy, and also to the doctrine that a distinction must be drawn between things that have been recaptured by military exploit and those that have been ransomed by bargain.

To sum up: those things which admit of postliminy revest, on recapture, in their former owner and resume their former status, whether movables or immovables, and whether their restoration is due to military exploit or to bargaining or is brought about in any other way—subject to this, that the ransom-price of those things that have been ransomed must be repaid; but those things which do not admit of postliminy pass as booty to the captor.

[37] It must, however, be observed that booty only begins to belong to the enemy at the moment when it is taken within his lines (*intra præsidia*). If, then, it is recaptured before having been taken within the enemy's lines, it must be unconditionally restored to its former owner, for it has never ceased to belong to him, never having become the enemy's. And, should those who have retaken the booty have fraudulently allowed it to be first carried off by the enemy and taken within his lines and neglect to follow it up, they will not only have to restore to its former owner what they have retaken, but they must also make good to the owner anything which they might have succeeded in saving, and which has been lost through their fault. There is an excellent rule to this effect in the constitutions of the Kingdom of Spain, and there is a text on the subject in Dig. 6, 1, 17.

[38] Once more: property taken by pirates or brigands or those who are not "just" enemies is not affected in any way by the distinction whether or no the recaptured thing is of a kind which admits of postliminy or by the question whether or no it has been taken *intra præsidia*; for the things which such persons capture never pass into their ownership and accordingly, when they are retaken they must be restored, with-

Dig. 49, 15: 24, 27, and 19(2). And 23, 1, 13. Last §. Dig. 49, 15, 27.

Dig. 49, 15: 2, 4, 20(1), and 30. And Cod. 8, 50, 2.

Dig. 49, 15, 12, 7. Cod. 8, 50, 17. Dig. 49, 15: 28 and 30.

Leading text in Dig. 49, 15: 4 and 26. Instit. 1, 12, 5 and Cod. 8, 50, 2.

Span. Ordin., bks. 26 and 31, tit. 6, par. 2: and bk. 13, tit. 9, par. 5.

Dig. 49, 15: 5, (pr.) and 19(10). Dig. 49, 15, 5, pr.

out any distinction or condition, to their former owner, who has never lost his ownership of them.

[39] This makes one wonder at that ordinance of the Kingdom of Spain according to which this distinction (namely, whether or no the recaptured property has been taken *intra præsidia*) applies to property seized by pirates and not only to property captured by enemies; for, if we take the moral and equitable point of view, we find that there is no law, human or divine, by which the ownership of captured property can pass out of the true owner to one who is not a "just" enemy, and so reason and justice require that such property when recaptured shall be unconditionally restored to its former owner, unless a contrary rule be found expedient in the public interest in order to increase the keenness of soldiers in the pursuit of brigands and pirates, especially since measures may be concerted for the public good, even when they involve private loss. This is the idea underlying Tacitus' remark that on every great occasion there is an element of injustice present in which the detriment of individuals is counterbalanced by the gain to the public. Otherwise the exception which we are considering seems quite harsh.

Span. Ordin., bk. 31,  
tit. 29, par. 2.

Dig. 21, 2, 11; and 6,  
1, 15. And c. 53 (?)  
Reg. jur. in vi.

The Romans, moreover, often would order the restoration to their allies or citizens of booty which they discovered to have belonged to them when found in the possession not only of brigands and pirates, but also of a "just" enemy. Accordingly after the Volscians had been compelled to surrender and their camp had been captured, a part of the booty was handed over to the Latins and Hernicians, allies of the Roman people, who recognized it as their property. Similarly with the town of Sutrium: its inhabitants, allies of the Roman people, had surrendered their town by treaty to the Etruscans, as they were unable to endure any longer the siege of it; on the same day it was retaken under the leadership of Camillus, and before nightfall it had been restored to its inhabitants whole, inviolate, and unhurt by any havoc of war. So also on the capture of Carthage, which was full of statues and votive-offerings in the Greek style brought from Sicily, Scipio issued a proclamation inviting representatives from each quarter of the city to come and find out what belonged to them and take it away with them. But of course treatment of that kind depends on the complaisance of the general, who has, as we have shown, all discretionary power over booty.

Livy, bk. 4.

Livy, bk. 6.

Plut. Apophth.

[40] The following is a question on which there is genuine room for doubt: A thing is stolen by robbers or seized by "unjust" enemies and subsequently it comes into the power of a "just" enemy; from him it is won back by our citizens, either by military exploit or for monetary consideration: ought this thing to be restored to its original owner? Now Javolenus has a response to the effect that a stolen slave who subsequently falls into the hands of the enemy can not, nevertheless, be recaptured by a buyer, just because of the original theft. That the slave had

Dig. 40, 15, 27.

been an enemy's, or that he had become subject to the law of postliminy upon his return, would not have prevented usucapion.

I admit this in the case of a slave, because of the law of postliminy, but I should hesitate to follow it in other cases to which the law of postliminy is inapplicable, since it is certain that the thing has become enemy's property and that its original owner has thereby lost his ownership. For what difference does it make, so long as the war was a just one, whether the enemy has seized the thing from a true owner or from a thief? For the rule that the taint of theft, inhering in a thing, can not be purged until the thing returns into its true owner's power (as provided by the

Dig. 41, 3, 4, 6. *Lex Atinia*) only operates (so I think) between citizens and citizens, and not between citizens and enemies; and, in order that a thing captured in war may become our property, nothing more is needed than that it belonged to an enemy. This opinion seems to me agreeable to law; but

Dig. 41, 1: 5 and 51.

I have no objection to every one using his own judgment. If, however, the final decision is that the thing continues *furtiva* (tainted with theft) I think it would be fair only to grant an action against the present pos-

Dig. 15, 1, 4, 5. sessor if the thief or his heir be insolvent.

So far then about corporeal things and persons, whether free or slave, captured in war.

[41, 42] Now there used to be a question whether incorporeal things also can be captured in war and transferred into the victor's ownership, and, assuming that they can, whether they are subject to the law of postliminy or not. That question underlay the celebrated lawsuit be-

Bk. 5, ch. 10.

tween the Thebans and the Thessalians, which Quintilian mentions. For when Alexander overthrew Thebes he found a bond under which the Thessalians stood indebted to the Thebans in the sum of a hundred talents. This bond he gave to the Thessalians in requital of the military services they had rendered to him. Subsequently the fortunes of the Thebans were restored by Cassander and they brought action against the Thessalians. The point of the suit was about the effect of Alexander's gift of the bond. Now it is clear that Alexander could not make over that obligation to the Thessalians by way of gift since it was a matter of

Dig. 17, 2, 3 and

Accurt. thereon.

Dig. 15, 1, 51.

Dig. 49, 15, 28.

Instit. 2, 1, 17.

law cohering to the person in an inseparable manner; besides, matters of law are incorporeal and do not admit of manual seizure, and only those things become the conqueror's which he has actually seized. Nay, they do not remain his longer than he is actually in possession of them, since they can be taken away from him by the same right as that by which he got

Dig. 49, 15, 28 them.

There is, further, a marked difference between the position of an heir and that of a conqueror; what passes to the former is a right, what passes to the latter is a thing. And the proposition that a public right of credit can not pass to the conqueror may be maintained on the ground that a public credit is due to each individual and so as long as there is a

Dig. 5, 3, 1.

Dig. 49, 15, 28.

single surviving creditor he is the creditor of the whole amount. Nay, the same people and State may be considered as surviving, even if there be no survivor of those living at the date of the contract, but only their successors. There is a considered opinion of Alphenus to this effect.

Dig. 5, 1, 76; and 30: 24 and 22, at end.

[43] For the rights of a people do not reside in individuals, but in the *universitas* (aggregate), and this *universitas* is represented by successors as well as by those alive at any given time: and that is the meaning of saying that a *universitas* does not die or come to an end so long as there is even one survivor.

Dig. 3, 4, 7, 2.

One remaining point may be urged in the case before us, namely, that the legal situation did not depend on the fate of the document, the writing not being the substance of the contract, but only furnishing evidence thereof; and, accordingly, Alexander got nothing and the Thebans lost nothing either by the seizure or by the gift of the document.

Dig. 20, 1, 4.  
Cod. 2, 4, 2.  
Dig. 22, 4, 4.

However, notwithstanding all this, the decision in the case before us must be that the right of public credit was embodied in the document and vested in Alexander, and that Alexander could, accordingly, release the Thessalians from their bond-obligation to the Thebans, which he is taken to have intended by the gift of the document. For since the law of war invests the conqueror with power and dominion over the conquered and allows him to issue such commands to them as he pleases, he can not only seize their corporeal property, but also such as is mere matter of law, and he can lay down or repeal laws for them at his discretion. And seeing that (as Livy says) everything is yielded up to the military conqueror it is within his right and discretion to keep as much thereof as he likes by way of penalty.

Now a debt due is part of the estate of the creditor; hence any debts due to the conquered pass, with the conquered themselves, into the dominion of the conqueror; for he who is in the power of another can have nothing in his own power. The immediate result is that the ownership of the debt which the Thessalians owed to the Thebans vested in Alexander, and that when he made it over by way of gift to the Thessalians—for a gift of a document is taken to be a gift of the contents of the document, and an agreement not to sue is implied when a creditor returns the bond to the debtor—the Thessalians were in consequence freed from their debt. This will be our conclusion—unless we hold that the Thebans retook the debt by way of postliminy when Cassander came to their rescue; for when a person returns with postliminy, all matters of law are put in the same position as if he had never been in the enemy's power; and in that case we should have to assert that a State can be restored by the fiction of postliminy and be made the same as before, reacquiring its rights and status just as we have asserted with reference to the ownership of land which has been taken and retaken, and with reference to the usufruct thereof (which is mere matter of law); and it is in

Dig. 35, 2, 1, 13; and 15, 1, 9, 1. Accurt. on Cod. 4, 39, 2.

Dig. 50, 17, 118.

Cod. 8, 53, 1.

Dig. 2, 14, 2; and 39, 6, 18, 2.

Dig. 49, 15, 12, 5 and 6.

Dig. 49, 15, 20, 1.  
Dig. 7, 4, 23.  
Instit. 2, 2.  
Dig. 11, 7, 30.

this way that the fiction of postliminy operates in the case of sacred and religious places.

Suppose, however, that in the case before us the Thessalians had paid the debt to the conquering Alexander, in whom, as we have said, it vested: I hold that then, after the fortunes of the Thebans had been restored by Cassander, they would not have been able to invoke the law of postliminy, in order to reacquire a debt which had once been extinguished. A judgment to this effect in an almost precisely similar case is recorded by Joannes Paponius. For payment duly made utterly destroys an obligation, both civilly and naturally (as the jurist Pomponius says), it being in the nature of things that the manner of unbinding should

Dig. 46, 3, 107.  
Accurt. on Dig. 46,  
3, 23.

correspond to the manner of binding.

Now the law of postliminy does not restore things which in fact and nature have been lawfully destroyed; and, surely, matters of law have in this respect no supremacy over matters of fact. This is the basis of the rule whereby, although a slave can not bind himself even *naturaliter*, yet if any one repays a slave's loan—even the slave himself after his manumission—no action will lie to get back what has been paid; for one fact balances the other. Between fact and fact there is an exact and harmonious proportion and resemblance; it is not so between fact and law; but between law and law it is so in a very striking manner.

Dig. 50, 17, 106.

Accordingly, if the mode in which the Thessalian debt was released was either formal discharge (*acceptilatio*) or an agreement not to sue or the return of the bond—involving much less evidential certainty than payment does—then, since there has been no intervention of a matter of fact, the right of credit must be held to revest in the Thebans by law of postliminy. For in none of these modes is the obligation destroyed quite as it is by payment, for payment utterly destroys the obligation, by the fact itself, nor have equity and good faith (which prevent the same debt from being paid twice over) the same operation in the cases named.

And indeed, if the documents which we are dealing with had been seized by any other than a sovereign prince (such as Alexander was) my opinion is that no right could have been claimed by him in reliance on the considerations just urged by us against the contrary opinion, and that there would, accordingly, be no occasion for the fiction of postliminy—not even if the documents related to a private right of credit, unless the creditor in whose possession the documents were, chanced to be a prisoner of war, i. e., one who in olden times would have been made a slave, incapable of owning anything and subjected to another's ownership both as regards person and property. Since, however, prisoners taken in war between Christians are not nowadays enslaved, the case is different, for the person of the prisoner does not pass into the ownership of his captor, nor does any right which is so inherent in his person as to be inseparable from it, vest in his captor.

In Arrest., bk. 5,  
tit. 6.  
Dig. 5, 3, 25, 17, at  
certe.

Dig. 49, 15, 12, 2.  
Dig. 2, 14, 27, 2; and  
50, 17, 8.  
Cod. 6, 24, 3.

Dig. 15, 1, 41.

Dig. 12, 6: 13  
and 64.

Instit. 3, 28, 1.

Instit. 3, 28, 1; and  
4, 13, 3.  
Cod. 8, 42, 14.

Instit. 3, 28 and  
Dig. 5, 3, 25, 17.

Dig. 50, 17, 57.

Dig. 41, 10, 1.

Dig. 17, 2, 3 and  
Accurt. thereon.

## CHAPTER VI.

*Of keeping faith with an enemy.*

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| <ol style="list-style-type: none"> <li>1. The Romans paid great respect to good faith.</li> <li>2. When we have given our word to an enemy, whether in public or in private, it must be kept.</li> <li>3. The edict <i>quod metus causa</i> inapplicable where we have given our word to an enemy.</li> <li>4. Perjury can not be justified by resort to subterfuge or trick.</li> <li>5. Whether the giving of hostages discharges the obligation to keep faith.</li> <li>6. Whether faith must be kept with an unjust enemy.</li> <li>7. The laws of war not framed for unjust enemies.</li> <li>8. Agreements extorted by tyranny or rebellion are not binding.</li> <li>9. The prince can not alienate what belongs to the royal prerogative.</li> <li>10. The special functions of the sovereign.</li> <li>11. Agreements made with rebel subjects have no validity.</li> </ol> | <ol style="list-style-type: none"> <li>12. Rebels and brigands to be put down by force, not by bargaining.</li> <li>13. Faith not in every case to be kept with an enemy.</li> <li>14. An oath to commit an unlawful act not binding.</li> <li>15. An oath by a private person to do something detrimental to the State not binding.</li> <li>16. Better to abstain from unlawful oaths than to break them.</li> <li>17. Faith need not be kept with an enemy who has broken his word.</li> <li>18. Whether a truce subsists if the enemy breaks it.</li> <li>19. A truce may be granted to continue for a long period.</li> <li>20. Meaning of saying that faith need not be kept with one who has broken his word.</li> <li>21. Unlawful to requite perfidy with perfidy.</li> <li>22. Whether an agreement induced by fraud is binding.</li> </ol> |
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[1] They of olden time always held that there was no grander or more sacred matter in human life than good faith; and the Romans had Good Faith placed next to Jupiter Optimus Maximus in the Capitol; and when they had once pledged their word, there was nothing more durable. And so Aulus Gellius tells us that, while the Roman people carried to a high pitch the reverent pursuit of all kinds of virtue, yet they revered good faith over and beyond all, holding it sacred alike in public and in private affairs. Among the numerous proofs and examples of this, the following is extremely striking. When the arrangement of a truce between them and Perseus was being celebrated with public games in the Circus, some of the enemy's chieftains entered and took part in the chariot race and they were crowned as winners. Aye, and the Roman people gave up very illustrious consuls to the enemy rather than suffer their public good faith to be impugned, as we have elsewhere mentioned in connection with Postumius and Mancinus. On this account King Ptolemy, of Egypt, recognizing the good faith of the Roman people, made a will appointing them guardian of his infant son and heir. And Ulpian speaks truly in saying that it is a serious thing to break faith; nor is anything so characteristic a manifestation of good faith as the keeping of agreements.

Noct. Attic., bk. 20, ch. 2.  
Above, ch. 1.  
Dig. 13, 5, 1.  
Dig. 2, 14, 1.

Offic., bk. 3.

Further (as Cicero says) our forefathers insisted that there was no more rigid fetter for safe-guarding the inviolability of good faith than the oath. This is demonstrated by provisions in the Twelve Tables, by religion, and by treaties in which the obligation of good faith, even with an enemy, is postulated.

Indeed the Romans, in addition to their sedulous respect for the laws of war and peace in general, attached a most sacred importance to the keeping of good faith on every occasion when circumstances led them to give an undertaking to the enemy. Accordingly we have that renowned reply given by Sextus Pompeius, son of the great Pompeius, to Menodorus, the admiral of Pompeius' fleet. Pompeius had made an alliance with Antonius and Octavius, and they were dining with him on board ship off Puteoli. Menodorus sent a message to the effect, first, that it was the very moment for Pompeius to avenge the death of his father and brother and seize the opportunity of claiming his father's sway for himself; and, secondly, that he would see that no one escaped from the ship. Pompeius replied, "Would that Menodorus could accomplish this without me; perfidy is befitting to him, but not to Pompeius."

Appian, Civil war, bk. 5.

[2] There are, however, those who hold it obligatory to keep faith with an enemy when publicly given, but not when given by a private person—a position unsupported by any solid arguments and at variance with the examples furnished by men of old and with the institutions of our forefathers and with the teaching of the weightiest philosophers, as described by Cicero in his elegant manner and by Gellius. Accordingly, whenever a transaction is entered into with a just and lawful enemy, I hold that terms and agreements relating to the war and hostilities ought not to be perfidiously upset, even when they have been entered into by private persons, for it is a serious thing to break faith.

Bartol. and others on Dig. 2, 14, 5. Zas. in apolog. against Eck. and in Jud. qu. 3.

Offic., bk. 3.

Bk. 7, ch. 10; bk. 20, ch. 1.

Dig. 13, 5, 1.

Text in c. 3, C. 23 qu. 1. Dig. 49, 15, 5, 3. Fortun. and Duaren. on Dig. 2, 14, 5. Decius on Dig. 50, 17, 65. Covarr. bk. 4. Decret. 2, par. C. 3, §4.

And certain duties are owed (as Cicero points out) even to those at whose hands we have suffered wrong. In this connection we have the fine deed of Marcus Attilius Regulus. He had been taken prisoner by the Carthaginians in the first Punic war and been sent to Rome, under an oath to return, in connection with an exchange of prisoners. Immediately on his arrival he dissuaded the Senate from returning their prisoners; and then, when his relatives and friends would have kept him, he preferred to return to punishment rather than break the word which he had given to an enemy. St. Augustine highly extols this conduct. Jacob, too, was incensed with his sons, Simeon and Levi, for violating the agreement which they had made with the Shechemites and he cursed them on his death-bed.

Offic., bk. 3.

Cic., Offic., bk. 3. Val. Max., bk. 1, ch. 1.

Kingdom of God, bk. 1, ch. 18.

Genes. 34.

Genes. 48.

We must also repudiate the doctrine that there is no need to abide by an agreement which the enemy has obtained by force. For, as Cicero puts it, you can not apply force to a brave man, and good faith (which

Seneca terms the most sacred possession of the human heart) can not be debauched by the stress of any necessity or perverted by any lure. Cicero, accordingly, writes: "There is nothing which is capable of exercising upon one a greater degree of duress than good faith does."

[3] Further, when the prætor's edict promises *restitutio in integrum* (rescission of the transaction) in cases of duress it does not refer to that duress which is lawfully exercised, as in a "just war," or to engagements formed with the enemy, but between citizen and citizen. And the force of an oath in earlier days is shown by the case of Marcus Pomponius, tribune of the plebs. He had named a day for the trial of Lucius Manlius, son of Aulus, on a charge of having added a few days to the period of his dictatorship and also of having banished his son Titus, later styled Torquatus, and having ordered him to live in the country. Thereupon a youthful son of Lucius Manlius, who gathered that his father was in trouble, came with drawn sword and compelled Pomponius, in the absence of any witnesses, to swear that he would release his father. And, although this put him under no legal compulsion so to do, yet he stopped the proceedings against Lucius Manlius and released him.

And so Ferrandus the Deacon, writing to Count Reginus on the subject of the duty of a true and pious Christian general, fitly condemned false swearing in order to deceive any enemy, no matter how inveterate and dangerous to the State, or how great an obstacle to peace his life is and how great a help his death would be, seeing that divine claims are higher than human and (in the words of Peter, chief of Apostles), "We ought to obey God rather than men." Wherefore, with whomsoever we are at war, as the aforesaid Ferrandus says, even when no good faith has been pledged in the war or when peace was made, the State must be saved or served by an inviolate respect for the oath; for what advantage will it be to conquer one whom the Devil, by making him swear falsely in the hope of victory, has conquered already. Accordingly, when the Psalmist sings, "Lord, who shall abide in thy tabernacle? who shall dwell in thy holy hill?" he answers himself with these words which he puts into God's mouth: "He that speaketh the truth in his heart, that backbiteth not with his tongue, nor doeth evil to his neighbor, nor taketh up a reproach against his neighbor; who sweareth to his neighbor and deceiveth him not."

Now, says the Deacon already mentioned, he swears to his neighbor and deceives him not who carries out in conduct whatever he has sworn with his tongue; and let no one imagine that an enemy with whom an oath is made is not included in the word a "neighbor," for the object of the oath is that he should be reckoned a neighbor. A treaty of peace turns an enemy into a friend. It is, therefore, the height of impiety to swear falsely and, considered closely, such conduct is unprofitable and

Epiat. 89.

Leading text in Dig. 4, 2, 21. Panormitan. on c. 2, X, 1, 40, col. 3, and c. 6, X, 1, 40. Felinus on c. 5, X, 2 25, nu. 20. Dom. on c. 4, Dist. 5, last col. Sylvest. on word metus, qu. 6.

Cic., Offic., bk. 3.  
Livy, bk. 7.

Acts 5, 29.

Psalm 15.

hurtful in the extreme to a general or leader of an army, for the sacredness of the oath is the bond of military discipline and if the general sets the example of lightly esteeming it as regards both enemy and his own men, everything must fall into muddle and confusion, for he will not be able to rely on the word of his enemy or on the fidelity of his own men.

Whatever, then, is confirmed by the addition of an oath and the invocation of God's name—whether it be a promise of clemency to an enemy or of pardon to the guilty or of reward for good conduct to the troops—must not be brought to naught by any consideration of expediency or by any fear of danger. A declaration, to the good faith of which God has been invoked as witness, must stand fixed and unchangeable.

[4] We must, in addition, check all attempts to overreach by false swearing and to impair the sanctity of the oath by a sort of chicanery and over-cunning and perverted interpretation of the law—such as his  
 Cic., *Offic.*, bk. 1. who during a truce of thirty days used to go ravaging by night; or such as that of Quintus Fabius Labeo, who (according to some accounts) being entitled, under a treaty made after his defeat of Antiochus, to keep a half part of Antiochus' fleet, cut each ship in half in order to deprive  
 Val. Max., bk. 7, ch. 3. the king of the whole of his fleet. A similar example was furnished by one of the ten whom Hannibal sent to the Senate after the defeat of Cannæ, under an oath to return to his camp if they failed to arrange for a ransom of prisoners. This man stayed behind in Rome on the pretext that he had returned to the camp very shortly after leaving it and that this return released him from his oath. This was incorrect, for, as Cicero says, fraud may foil perjury but does not annul it, and so the  
 Cic., *Offic.*, bk. 3. Senate ordered the sly old fox to be bound and taken back to Hannibal.  
 Livy, bk. 22.

And the answer of Censorinus (if we may trust Appian) is suscep- Punic war.  
 tible of an explanation in this sense. The Carthaginian envoys had remonstrated because, after their surrender of hostages and all arms, he proposed, in defiance of his pledged word, to destroy Carthage into the bargain; he replied that when the Romans undertook that Carthage should be free they did not mean by the word Carthage the town and the soil.

[5] Nor is that opinion sound which is maintained in some quarters, that the giving of hostages operates to discharge one from the obligation to keep faith. That is the ground upon which Bodin held that  
 Republic, bk. 1, ch. 8. Francis of France was freed from the obligations of the treaty of Madrid, because he had given his sons as hostages—on the analogy of the peace of Caudium, which Bodin asserts to have been discharged after hostages had been given. This, however, is contrary to the truth of history, for when the consul Postumius, the author of the peace, was asked his opinion, he declared that the Roman people were not bound by the undertaking into which he had himself entered with the Samnites,

because he had entered into it without authorization from the Roman people. His words were: "I do not deny, Conscript Fathers, that engagements and treaties are alike binding among those peoples who put the observance of good faith in the same rank as their duty to the gods, but I assert that no solemnity which the people have not authorized can cast a binding obligation upon them." He declared that he was himself, however, bound by the engagement, whether justifiable or unjustifiable, and he started and supported the proposal that, in order to free the Roman people from any obligation and to enable them to repudiate the peace with the Samnites, he and the other authors of the peace should be delivered up, and this although six hundred knights had been given as hostages, who would be put to death if the bargain were departed from.

Livy, bk. 9.  
Cic., *Offic.*, bk. 3.

Now hostages, like sureties and pledges, are accessory to some principal obligation, in order the better to safeguard the interests of the other party, and so little do they destroy the principal obligation that they can not exist apart from it, any more than an accessory in general can exist apart from its principal or an accidental quality without the subject in which it inheres.

Instit. 3, 20, pr.  
Dig. 44, 7, 1, 7.  
Dig. 46, 1, 16, pr.;  
and 20, 1, 33. Alciat.  
de sing. cert. ch. 44.

Dig. 50, 17, 178;  
and 8, 4, 1.

Francis, accordingly, ought to have kept faith—if not the public faith (so far, maybe, as concerns those matters as to which the assent of people and estates was required), at any rate his own faith—and he ought to have returned to prison rather than break faith, following the example of Postumus, Mancinus, Regulus, and others; and this all the more because a prince, to whom the people has intrusted all its sovereignty and power, is the fit and proper person to frame bargains about State affairs, whether it be a case of making peace or any other arrangement with the enemy.

Dig. 1, 4, 1.

Dig. 2, 14, 5.

The behavior of John of France, then, was more correct. The English had taken him prisoner in battle and had released him on his parole that he would return if the terms arranged were not wholly carried out; and, as he could not perform all that had been agreed, he preferred to return to captivity rather than to break his word—and this although he had himself given a son as hostage.

Bodin, *Republic*,  
bk. 1, ch. 8.

[6] Now what we have laid down about keeping faith with an enemy must be scrupulously observed whenever we are dealing with a just and lawful enemy; but if any one happens to be compelled, by one who is not a "just" enemy, to pass his word about paying a ransom-price or such like, we hold that he is under no obligation to keep his word. And so (as Cicero says) if you fail to pay to pirates the sum promised for sparing your life, there is no fraud, not even if you swore to do what you have failed to do, for a pirate is not included in the list of State enemies, but is the common enemy of all and we ought to have no matter of good faith or oath in common with him; and that is the reason why the jurists say that brigands and pirates are not denoted by the word "hostes."

*Offic.*, bk. 3.

Text in c. 2, and c.  
29, X, 2, 24, and c.  
2, X, 2, 13.

Dig. 49, 15, 24;  
and 50, 16, 118.

[7] The laws of war, therefore, and of captivity and of post-liminy, which only apply in the case of enemies, can not apply in the case of brigands; and those who are taken prisoners by pirates or brigands remain entirely free. Since then those alone who are "just" enemies can invoke to their profit the law of war, those who are not reckoned as "hostes," and who therefore have no part or lot in the law of war, are not qualified to bargain about matters that only inure to the benefit of "just" enemies, nor are they justified in effecting such bargains by coercion.

Leading text in c. 29 and c. 2, X, 2, 24 and c. 2, X, 1, 40. And so, the edict of the prætor which promises rescission of transactions induced by duress is applicable; nay, anything done or promised in these circumstances is *ipso jure* void and will not be validated by the employment of an oath, for there is no confirming what is null, nor does an oath carry any obligation when it was extorted by gross and abominable compulsion. For greater security, however, absolution can be sued for and ought willingly to be granted.

What we have just now been saying is not vitiated by the fact that the law allows a robber the actions on pledge and deposit and loan, for this is the case when he contracts with some one other than his victim; he may well be a robber as regards him whose property he has seized without being a robber as regards him with whom he has made the contract, since in matters of contract the standard of good faith is fixed between the contracting parties only, without bringing in any outside considerations.

Again, our remarks about pirates and brigands apply equally to rebels: they can not be called "just" enemies, the two ideas "enemy" and "rebel" being quite distinct; and no one ought to be profited by his own wrong-doing. It is, however, true that, comprehensively and colloquially, all those are called enemies against whom we carry arms.

[8] It follows that those agreements which are extorted by a usurping force need not be respected; for consent, which is a necessary element in all contracts, is wanting in acts which have been procured by violence; transactions entered into in such circumstances are therefore void. Cicero, accordingly, lays it down that the laws of usurpers are not laws, especially naming the *Lex Valeria*. This law was introduced by Lucius Valerius Flaccus, who had been nominated *interrex* by the Senate when the slaughter of Carbo and Marius left the State without consuls and the Republic was overborne by the arms of Sulla. It proposed the appointment of Sulla as perpetual dictator in order to re-establish order in the State and the ratification of all that he had done, whether as consul or proconsul. And the same writer, Cicero, shows that this was of all laws the most unjust and un-lawlike.

Precisely the same thing holds good of those agreements which a lawless people (called usurper, too, by Cicero) extorts by rebellion from

its prince; and, indeed, if some have hesitated to admit that a prince and his subjects can be bound contractually, what are we to say of public agreements extorted by subjects through revolt and perfidy? For, inasmuch as rebels by the mere fact of rising against their prince violate their pledged word, it is vain for them to demand that faith be kept with them. (We shall soon have something to say on this point.) And how is it to be expected that any treaty will be ratified or any pledge be treated as sacred by those who, in violation of both divine and human law, have not shrunk from the depths of infamy and perfidy in their betrayal of their country. Or how can they swear by God who oppose what He has ordained? Or how can there be a compact of peace, in which nothing can be granted to him with whom the peace is made?

Moreover "unjust" enemies, as we have just shown, can not avail themselves of the law of war; for, as Cicero says, there can not be a just cause for taking up arms against one's country, and, consequently, against one's prince, who is the common father of all and has received all his power from God.

Further, seeing that the people can not even treat with outsiders about the concerns of the commonwealth—this matter being in the sole prerogative of the prince to whom the whole State has been intrusted and who has in his hands the choice of war and peace—much less can it drive the prince into an inequitable bargain; for the prince, whose office it is to give laws to his people and not to receive them, being outside the law, can not be fettered by any conditions of his subjects' imposition; nor can any one (as Ulpian says) give orders to himself and play the double part of coercer and coerced.

[9] Nor can there be an obligation which rests on the pleasure of the promisor. This is the bearing of what the canonists tell us in various places, that the Pope can never tie his own hands. And these principles are even more cogent when the prince is damnified by the bargain in question. In such a case he can claim the same reinstatement (*restitutio*) as a minor, especially where it is sought to detract from the sovereignty of the prince: for just as sovereign princes are incompetent to alienate any part of their realms—they being only life-tenants thereof; or, if owners, then only in the sense in which a husband is owner of the dowry (*dos*) without any power of alienation—so it is also with regard to any of the attributes of sovereignty and the royal prerogative; and if any of them has been alienated in point of fact, it ought to be put back in its former position and the prince's successors are not bound by the contract. Things which are part of the royal prerogative are not *in commercio* (i. e., objects of transfer), but are so annexed to the crown as to be inseparable from it, and they can not be alienated even by the prince, not even on a considered judgment or of his own motion. This is in keeping with Gaius' dictum that things belonging to the divine or public law are not susceptible of private ownership.

Bartol. on Dig. 43, 24, 3 4.  
Bald., on Feud. law, c. 1, 7  
and on c. 1, X, 2, 19, and on Cod., 2, 4, 43.  
Panormit. on c. 13, X, 2, 1. Specul. 2, 2, de instr. edit. §11.  
Anchor., Consult., 2.  
Felinus on c. 1, X, 2, 19, and others named by Bodin, Repub. 1, 9.

Cic., Philipp., 12.

Nov. 98 (end).

Paul, Rom., ch. 13.

Dig. 1, 4, 1.

c. 4, C. 23, qu. 1.

Dig. 1, 4, 1.

Dig. 1, 3, 31.

Dig. 36, 1, 13, 4; and 4, 8, 51.

Dig. 45, 1, 108, 1.

Cod. 2, 53, 4.

Bald. on Authent. Hoc amplius, Cod. 6, 42, 32 (Nov. 1, 1, 1). Joan Papon., in Arrest. 5, 10, generally.

Dig. 31, 69, 3. Cod. 11, 62, 8, and 12, 56, 2, and 11, 60, 2.

Cod. 11, 62, 8; and 11, 60, 2.  
Decision of Andr. Iser. Luc. in Joan. Papon. Ompha. approves, and others whom Molin. cites and follows, Custom of Paris, tit. 1, gloss 5. nu. 23. Bartol., Jas., Cyn., and others whom Bodin cites, Repub., 1, 10.

Dig. 30, 39, 7; and 36, 4, 17.

Dig. 1, 8, 1.

And even the employment of the oath will be of no avail in this matter, for the prohibition to alienate, being inherent in the thing itself, renders unlawful any oath thereafter taken. Whatever, indeed, belongs to the State or Kingdom can neither be alienated nor acquired by long user (*longi temporis præscriptio*): how, then, can those things which are reserved to the king's majesty in token of his sovereign power be severed from him, seeing that a prince does not lose his sovereignty even by a voluntary abdication?

And if (as is Ulpian's opinion) an agreement with a husband excluding the *beneficium competentiæ* (right of limiting his liability) and providing that he may be sued for the whole debt, ought not to be upheld, as being against good morals and inconsistent with the customary respect to which husbands are entitled, what must be our attitude towards a bargain which encroaches on the dignity due to the prince alike by divine and human law? There have been many writers, and much has been written, on this topic. It explains why a private person who usurps the royal titles and emblems is liable to capital punishment and to forfeiture of property; and in days gone by, under the *Lex Valeria*, any one who plotted to seize the throne was to be outlawed in body and in goods. And this also explains Bodin's doctrine that if the prince were to grant a special license to annul condemnations and remit penalties, it would be void, inasmuch as these are prerogatives of the sovereign and can only be exercised by him; and Baldus writes that no lapse of time bars the right of appeal to the sovereign prince.

[10] Further, Bodin correctly enumerated the especial functions of a sovereign as follows: to appoint the higher magistracy and allot his duties to each magistrate, to enact or repeal laws, to declare or conclude war, to be the ultimate court of appeal from all magistrates, and to exercise the power of life and death. And even if judges inflict punishments on wrong-doers, it does not follow that the power of life and death is theirs, for they are strictly limited by the laws and have no power to remit the death penalty where it has been deserved, it being an attribute of the sovereign to determine when to temper law with mercy. And so, on the expulsion of the kings, some regretted the changed character of the State, saying that the king was a man and one could apply to him personally to obtain one's right or one's revenge; that one could win a favor and a boon from him, and that he could be angry or could pardon; but that the laws were deaf and inexorable things, utterly bare of indulgence and forbearance.

And so, when Cicero craved pardon for Ligarius from Cæsar, he said: "I never addressed a court in this manner: Pardon him, judges; he has erred and fallen; he did not consider; if ever hereafter, etc.; but to a father that is the usual strain. Before a court it is: He never did it, never planned it; the evidence is false, the accusation false."

c. 8, X, 3, 13, and  
c. 32, X, 2, 24.

Cod. 11, 62, 8,  
and 11, 60, 2.

Dig. 1, 18, 20.

Dig. 24, 3, 14, 1.

Baldus, c. 1, nu. 3,  
on Feud. Law ii, 56.  
Felinus on c. 12, and  
c. 13, X, 2, 26.  
Anton. Butr., on c.  
13, X, 4, 17. Abbas  
on c. 12, X, 2, 26.  
Whom Zoannettus on  
Rom. Emp. men-  
tions and follows.

Dig. 48, 18, 1, end;  
and 48, 19: 8, end,  
and 31 and 4.

Bald. on Authent.  
Quas actiones, Cod. I,  
2, 23 (Nov. 131, 6),  
nu. 14, para. Ex  
his apparet.

Livy, bk. 2.

Cod. 1, 23, 6; and  
2, 15, 2.

Dion. Halic., Rom.  
antiq., bk. 5.  
Republic, bk. 1,  
last ch.

Text in c. 19,  
X, 2, 24.

Method. hist.,  
ch. 6.

The matters I have been referring to are, then, reserved to the prince; and when the Roman people, who were the repository of sovereignty, demitted many other matters to the Senate, they reserved these to themselves: Dionysius of Halicarnassus shows this over and over again. This applies especially to the power of appointing magistrates, passing laws, and deciding questions of war and peace; but the right of receiving ultimate appeals and the power of life and death were admittedly vested in the people by the *Lex Valeria*. These are matters which juriconsults hold to be so integral a part of the prince's majesty that they can not be shared with others; and in addition they name the granting of permission to seize hostages and of concessions to gather taxes and tribute and the power to mint money and some other matters. There are, however, instances in which some of these have been allowed to others than sovereigns: see, for all of them, Joannes Paponius, generally.

Rom. antiq., bks. 2, 4, and 6.

Dion. Halic., Rom. antiq., bk. 5.  
Livy, bk. 2.  
Val. Max., bk. 4, ch. 1.  
Plutarch, life of P. Valer. Publicola.

Guido Papae, quest. 498.

In Arrest., bk. 5, 1, and follg. titles.  
Bodin, Repub., bk. 1, last ch.

[11] Again, Bodin remarks that, for the reasons just now set out, there are no agreements which are more easily upset or require more wariness than those which rebel subjects make with their prince, and so he recommends insurgents not to make such contracts themselves, but to induce some outside neighboring prince to act for them. My advice, however, would be that they should return into the right way and humbly seek forgiveness and try to earn their prince's clemency by penitence instead of vexing his soul with compacts that have no law or equity about them; for nothing is more mortifying to a prince than to enter into a compact with rebellious subjects and to keep faith with them. Accordingly we read in Livy how Philip, after his defeat by the Romans, found one thing more galling than all others, namely, that among the conditions which were imposed on him by the Romans was one which deprived him of his right to chastise the Macedonians for revolting from him in the war.

Bk. 39

Those conventions, then, being bad which impair the majesty of the king, there can be no doubt about our attitude towards those which affront the Majesty of God (which can not suffer any derogation at man's hands, either by contract or by any length of prescription). Consistently herewith, Themistocles was wont to tell the Athenians, and Cato was wont to tell the Romans, that men can not acquire by usucapion anything which is the due of the Divine Majesty nor private persons anything belonging to the State; and Gaius similarly laid it down that things *divini juris* or *publici juris* are in no man's private ownership. And that noble passage of Ambrose is all in the same direction, in which he says, regarding the Emperor Valentinian:

Dig. 1, 8, 1.

Epist. 33.

"I am sued by court officials and tribunes, claiming a speedy delivery of the Basilica, and they say that the Emperor is within his right, because everything is under his power; my reply is that if he wants from

Plutarch, on Themistocles and Cato of Utica.

me anything that is mine—my land or my money—I shall make no opposition as regards any right of mine of this kind (although all that is mine might be said to belong to the poor); but the things which are God's are not subject to the imperial power."

Further, although compacts with brigands and rebels are invalid, as we have just shown, yet the prince would do well to abstain, as far as possible, from making them, both because they ill befit the prince's majesty and because there are certain evils which it is better to endure rather than that there should be any truck with the wicked.

[12] Moreover, the Romans pronounced it disgraceful in the extreme to make any terms with pirates, brigands, or rebels about peace or war or truces; and so we read that they would never arrange matters by a treaty or compact with those subjects who had revolted against the Roman sway; nay, they never rested until they had subdued them all, either by hard fighting or by compelling them to surrender, as we read was the case with the Latins and Campanians and other rebels. Cicero accordingly dissuaded Plancus from arranging a peace between Brutus and Antony, calling Antony's men the foulest of robbers, who either ought to throw down their weapons and beg for peace or, if they sought it with weapons still in their hands, ought to learn that peace is procured by victory and not by bargaining. And Cicero added that those who advised the despatch of envoys to Antony were ignorant of the laws of war and of the examples of their forefathers, and of what was required by the majesty of the Roman people and by the dignity of the Senate; for it was not the time for verbal requests, but for armed compulsion. And Cicero termed this war inexpiable, asserting thereby that the possibility of peace was excluded.

Similarly in the Social war, this war was commenced by the allies of the Roman people in the hope that they would no longer be subject to the Roman dominion but would become sharers in it, and they sent a mission to Rome to complain that they were not admitted to the rights of citizenship, although it was by their labor and assistance that the Romans had extended their dominions so far and wide. The Senate austerely replied that it would not receive their mission until they recovered their senses.

The case of Tacfarinas teaches the same thing: He was a robber of good birth who had reached such a pitch of arrogance as to send an embassy to Tiberius and to demand into the bargain a dwelling-place for himself and his troops under a repeated threat of inexpiable war. Tacitus tells us that it was said that the Emperor never felt more indignation at any insult offered to himself and the Roman people than at this:

"That a renegade and freebooter should act in the mode of a regular enemy (*hostis*). Why, it had not even been granted to Spartacus, when spreading fire through Italy unavenged and destroying one consu-

lar army after another—even although the commonwealth was tottering under the tremendous wars of Sertorius and Mithridates—that he should be received by agreement into a position calling for such good faith: much less that Tacfarinas, a brigand, when the Roman people was at the height of its splendor, should be bought off by a treaty of peace and a grant of lands.”

Thus Tacitus.

It is, however, usual to spare those who, without any compact, throw themselves on the good-faith of a commander. Fabius Maximus Æmilianus, accordingly, spared Conoba, a brigand-chief who had surrendered to him, and Augustus pardoned Crocola, a notorious brigand in Spain, upon whose head a price had been set and who had voluntarily given himself up; and Augustus caused the price to be paid to Crocola when he demanded it and forebore to punish him lest he should seem to play tricks in connection with the promised reward or to make treacherous use of Crocola's reliance on public law.

Appian, Spån. war.  
Dion. bk. 56.

[13] Again: there are occasions which are exceptions to the rule about keeping faith, and these occur not only when we are dealing with rebels and brigands and others who are not included in the list of enemies, but also when we are dealing with enemies and those who are arrayed against us in just war.

[14] First and foremost is the case where a person, overcome maybe by a weakness to which all are liable, has sworn to do something offensive to God, by whom he has sworn: he must not fulfil his oath, for an oath should not be a bond of iniquity, nor is it expedient to keep faith in wrongful promises, nor is there any bindingness in an oath, the taking of which violates good morals. Nay, he who does what is forbidden, simply because he has sworn to do it, adds one sin to another.

Sometimes, then, (as St. Ambrose says) it is a breach of duty to keep one's word: Cicero, too, perceived this; so did Seneca in his *Her- cules Cætaus*, where he says:

Præstare fateor posse me tacitam fidem,  
Si scelere careat: interim scelus est fides.

(I admit that I can pledge my word to silence when this is innocent: but otherwise to keep that pledge is guilty.)

For, in St. Augustine's words, to call the commission of a crime an exhibition of good faith, is to make a strange use of the term "good faith." David adopted a much juster course in departing from his oath to destroy Nabal than Herod did in killing a most holy man for his oath's sake. And Cicero is quite right in blaming the act of Agamemnon in sacrificing Iphigenia in pursuance of his vow to sacrifice to Diana the loveliest child in his kingdom; for, as Cicero says, it would have been far better not to carry out the promise than to commit a crime so foul. For the same reason we reprobate the deed of Gideon, similar to the

c. 2, and c. 4,  
C. 22, qu. 4.

c. 20, C. 22, qu. 4.

Offic., bk. 3.

c. 69, Reg. jur. in vi.

c. 58, Reg. jur. in vi.

c. 1, Dist. 13, and  
c. 21, C. 22, qu. 4.  
Offic., bk. 1.

Offic., bk. 3.

last-named, in having Jephtha's daughter sacrificed, in fulfilment of an oath.

An oath to do something unlawful ought, therefore, not to be performed and if there be any penalty attached to the non-performance it ought to be exacted from him who insists on the performance. And this holds true even where it is but a venial sin that is in contemplation.

[15] A corollary is that a pledge given by a private person to the hurt of State or Church must not be observed. This holds good where this hurt is the main point in issue, for the proximate cause must be regarded, not a remote cause. The case of Themistocles is in point here. When he was sent into exile, he betook himself to Xerxes, promising him that he would make war on the Athenians; subsequently that king called on him to keep his promise; and then, although he had received scandalous treatment from his fellow-citizens and been most humanely welcomed by Xerxes, yet he held it more honorable to put an end to his life than to fight his fatherland; so he committed suicide by poison.

We have also in this connection the fine discourse in which Caius Claudius begged Appius Claudius and the other decemvirs to resign their usurped power. The fact (if it were one) that they had made secret agreements with one another and had called the gods to witness their exchange of pledges, ought not, said he, to influence them; the keeping of such agreements would be impious, he insisted, and the breach of them a pious act, seeing that they were opposed to the interests of the citizens and the State; nor would the gods be gratified by being made parties to base, unjust conduct.

This idea is at the bottom of Ulpian's dictum that a partnership (*societas*) can not be formed with wrong-doing and dishonesty for its object; and it leads Cicero to declare that at times a breach of faith is a just act, e. g., to refuse to return a sword that has been deposited with one by a madman or by an enemy of one's country. For every act of ours ought to conform to the principles of justice, which are, first, to injure nobody and, second, to serve the common weal.

And so the poets, too, condemn rash oaths in their fable of Phaëthon, the moral of which is that it would have been better to violate an oath than to intrust the reins of the sun to an unskilled youth, to the whole world's ruin. And Paulus supports this doctrine where he says that an agreement which is outside private competence must not be kept: Ulpian, too, lays down the general principle that no agreement which infringes the common law ought to be kept, not even when accompanied by an oath, the law being superior in authority to an oath.

An oath, therefore, is void which is antagonistic to statutes and to the authority of the law. Hence in every oath there is an implied reservation in favor of paramount authority; and wherever the power of such a superior is involved, no oath can derogate from his power. For, one

Authent. Quod eis.  
Cod. 5, 4, 23, 2 (Nov.  
51, 6). And Cod. 6,  
25, 5.

Dig. 2, 14: 7(14) and  
16 and 38. And 2,  
8, 16. Glossators and  
doctors on Dig. 2, 14,  
5, and c. 2, bk. 2, 11,

in vi.  
Bartol on Cod. 3, 27,  
2. Alciat. De sing  
cer., c. 44. Text in  
c. 27, X, 2, 24 and  
c. 1, bk. 2, 11, in vi.  
Span. Ordin., last bk.,  
tit. 28, par. 2.

Dig. 2, 14, 7 and  
doctors thereon: c.  
2, bk. 1, 18, in vi.

Dig. 25, 2, 21.

Plutarch on  
Themistocles.

Dion. Halic., Rom.  
antiq., bk. 11.

Dig. 17, 2: 53 and 57.

Gloss on c. 6, C. 22,  
qu. 4. Felinus on c.  
8, X, 2, 24. Roland  
a Val., consult., 98,  
nu. 18. Alciatus on  
Cod. 2, 3, 6, nu. 52.

Offic., bk. 1.

Ovid, Metam., 2.

Dig. 2, 14, 27, 4.

Dig. 2, 14, 7, 16.

Dig. 30, 112, 4; and

37, 14, 6, 4.

Cod. 1, 14, 5.

c. 19, X, 2, 24 and

Felinus thereon:  
c. 16, X, 2, 24.

can not enter into an agreement relating to things beyond one's competence. It is for this reason that no stigma of perfidy attaches to Gonzalo, Viceroy of Naples, for his conduct in flinging Count Valentino into prison in obedience to an order from King Ferdinand, although he had pledged his word to the count that he would protect him. Hence, too, the emperors Severus and Caracalla intimated by rescript that they released from his oath a man who had vowed not to attend a meeting of the Senate.

Nay, an oath which is opposed to the interests of the State is taken to be released by mere operation of law: Paulus is an authority for this where he says that the *Lex Julia* releases oaths which are in restraint of marriage. For a condition or promise in restraint of marriage was so much discountenanced among the Romans that it was utterly expunged from testaments and other documents and taken as unwritten.

It will therefore be permissible to ignore private pledges in the interests of public security. For (says Cornelius Tacitus) the learned declare those transactions to be null and void where both the giving and the receiving are inconsistent with the welfare of the State; and, as comment on that opinion, we have the noble utterance of Postumius, in which he demonstrated that the Roman people were not bound by the arrangement which he had made with the Samnites, despite the exertions to the contrary of Lucius Livius and Quintus Melius, tribunes of the plebs, who had shared with him the authorship of the peace of Caudium and who were trying to show that the Roman people were bound by the oath, so as to save themselves from being surrendered.

[16] It would, however, be much the safer and more praiseworthy course not to allow oneself to be driven by any fear of danger into pledging one's word to do something unlawful rather than to break the word so pledged; for he who vows to do something which is unlawful is, by the very fact, forsworn, and every conceivable evil is more tolerable than to truck with evil. And on this ground the intrepidity of Pontius, a soldier of Cæsar's faction, is indeed praiseworthy. He was out on the watch before Cæsar's quarters and was cut off by a troop of Scipio's guards; one chance of safety was given him, namely, that he should declare that for the future he would be a soldier of Cnæus Pompeius; but he hesitated not to reply: "I am much obliged to you, Scipio; but the match which you propose does not suit me."

Equal confidence was displayed by Caius Mevius, a centurion of Augustus: he had often brought off notable fights in the course of the war with Antony, but fell into an undetected snare of the enemy and was taken to Antony at Alexandria; there he was asked what the decision in his case ought to be: "Have me killed," said he, "for I can not be lured from Cæsar's service into yours by any bribe of safety or by any threat of death." But it was just this intrepid scorn of life which easily gained it for him; for Antony rewarded his valor with a grant of safety.

Bodin, *Repub.*, bk. 1, ch. 8.  
[In l. ult. D. de adminic. (?).]

Dig. 37, 14, 6, 4.

Cod. 6, 40, 2.  
Dig. 35, 1: 62(2) and 74.

Livy, bk. 9.

c. 27, X, 2, 24.  
Gloss on c. 1, bk. 2, 11, in vi.

c. 3, C. 32, qu. 5.

Val. Max., bk. 3, ch. 8.

And, not to mention individuals, Saguntum, a wealthy town in Spain, is a conspicuous, though sad, monument of good faith towards the Romans. After a protracted siege it was unable to defend itself from Hannibal any longer, and the Romans could send no help to it; so, spurning dishonorable terms of peace, the whole of Saguntum threw itself and all its goods upon the funeral pile rather than defect from the Romans to whom it was bound by treaty.

Livy, bk. 21. Val.  
Max., bk. 6, ch. 6.  
Florus, bk. 2, ch. 6.

[17] Lastly, faith need not be kept, not even when accompanied by an oath, with an enemy who breaks faith. This applies both to public and to private agreements; according to the verse,

c. 3 and c. 29, X, 2,  
24. And Dig. 2, 15,  
16; and 19, 1, 13, 8;  
and 5, 2, 27.  
Cod. 2, 3, 21; and  
2, 4; 17 and 14.

Fallere fallentem, fraudemque repellere fraude,  
Exemplo licet ludere quemque suo.

(Cheats we may cheat, and fraud by fraud evade,  
And trick each trickster by the trick he played.)

Text in c. 29, X 2,  
24, last §. Gloss  
on Dig. 2, 14 (?).

For it is part of the general law of contract that no one is bound by a contract unless the other party performs what he has undertaken, it being futile for one who refuses to keep faith with another to claim that that other shall keep faith with him. It is knavish to insist that a given principle applies as against the other side, but not as against oneself, and the prætor's edict meets such conduct by providing that whatever proposition of law one party sets up against the other party he must submit to himself. Nor can any one be charged with breach of faith in consequence; he is rather proceeding under the law of war, upon a new and the same most just cause, i. e., breach of faith, against enemies who have slighted both divine and human law. That is why infraction of treaties led the Romans to make war on the Sabines, Latins, Privernians, Volscians, Hernicians, Apulians, Samnites, Etruscans, Æquians, and Carthaginians, and on very many others, and why the Senate visited the infraction of treaty which the towns of Epirus had been guilty of in defecting to Perseus, by razing their walls to the ground and giving them over to the army to loot.

Cod. 2, 3, 21.  
c. 75, Reg. jur. in vi.  
And Dig. 31, 77, 27.

Livy, bk. 35.

For circumstances that may hereafter arise are outside the scope of an oath, and, if some novel factor emerges, any one can refuse to carry out what he has sworn. This tallies with Cicero's doctrine, that there are occasions when duty completely changes shape, and the just course is not to keep faith, e. g., when it is a question of returning to a madman or to an enemy of one's country a sword that he has deposited with us. And there is implied in every oath a condition such as, "Provided that good faith be kept with me," or as, "Save so far as the other party is responsible for the non-performance of this agreement." If this latter clause is called into operation, a tacit release of the agreement is assumed to occur, and the first to contravene the agreement is alone taken to have broken faith, so that the consequential act of the other party can not be reckoned a violation of his oath.

c. 20, c. 25 and c. 35,  
X, 2, 24. And c. 2,  
X, 1, 9. And Dig.  
38, 9, 11; and 2, 15;  
5 and 9. And 2, 14,  
35. Cod. 2, 4, 31.

c. 3, c. 25 and c. 29,  
end, X, 2, 24.  
Dig. 19, 2, 54, 1.

Offic., bk. 1.

Cod. 4, 33, 4.

c. 7, X, 5, 37.

This explains that well-known dispute between Romulus and Cluilius, the Alban dictator, as to which of them had been the first to depart from the terms of the treaty, for that one would alone be guilty of violating the treaty and the earlier act of non-observance would, accordingly, be held to be the subsisting cause of the war. For if a breach of faith occur with regard to some matter in contemplation of which the contract was entered into, the whole agreement falls to the ground and everything goes back into its original position.

Dion. Halic., Rom. antiq., bk. 3.

Cod. 4, 54, 6; and 2, 3, 21. Dig. 4, 3, 7.

Ulpian, accordingly, says that the action on partnership does not lie against one who retires from a partnership because of failure of some condition subject to which the partnership was formed. The same writer lays it down that a right of action on an undutious will subsists unimpaired despite a compromise, should the heir break faith in carrying the compromise into effect. For there is a mutuality in an obligation whereby each party is so bound as that either is released on his side if the other fails to perform what he has undertaken. And this holds good whether a penalty is stipulated in the agreement or not, no penalty being due in the former case, and even when it is something quite unavoidable that prevents the other side from carrying out his part. For such a hindrance may save him from being *in mora* (accountable for delay) or from incurring a penalty, but it is inadequate to keep alive his right of action.

Dig. 17, 2, 14.

Dig. 5, 2, 27, pr.

Dig. 19, 2, 54, 1.

Alejat. on Cod. 2, 3, 21.

Dig. 14, 2, 10, 1, mid.

Dig. 19, 2, 15, 4.

All this applies, no matter how small the matter in which there has been a neglect to keep faith, unless it be so trivial that there is no likelihood of either side having attached much importance to it. Further, the duty imposed on each side to keep faith is so absolute that even if the moving consideration of the promise fails, the obligation none the less endures. Should it not be quite clear which of the two was the first to break faith, there must be a kind of mutual set-off and each must be absolved from the stipulated penalty; for it is a common saying that there can be set-off in cases of equal delict. Hence comes the admitted doctrine that a litigant may counter the craftiness of his opponent with craftiness of his own, picking out the crow's own eyes (as the saying goes); but this is subject to the provision that he has a good cause and abstains from such fraud as overpasses the boundary into crime, such as forgery, criminal knavery (*stellionatus*), and the like.

Dig. 21, 1, 1, 2.

Alex. on Cod. 6, 35, 11. Corn., Consult. 246, bk. 3, Ale., Consult. 167. Bald. on Dig. 18, 1, 72. Tiraqueau on title De jud. in reb. exig. ferend. Dig. 18, 5, 10, 1.

c. 7, X, 5, 27.

Dig. 24, 3, 39.

c. 2, C. 23, qu. 2.

Gloss on c. 16, bk. 1, 6 in vi. versic. malignantium.

Butr. on c. 3. Reg. jur. in vi. Alejat. on Cod. 2, 4, 17.

[18] What has just been said is generally accepted with regard to compacts, or treaties, of peace, but there are many who reject it with regard to truces, it being thought that these ought to be considered inviolable, even though the enemy breaks his word with regard to them; and this opinion as being the sounder and juster has been adopted by the assessors of the imperial chamber, so Mynsinger tells us, and he adds a reason for the distinction, which others too rely on, namely, that when the period of a truce is at an end the aggrieved person can take measures

Vinc., Joan. Andr., Ant. de Butr., Card., Angel., Cast., Felin., Jas., Alejat., Laud., and the two Socini whom Petrin. Bel. mentions de re militari, par. 5, tit. 3, and Mynsin., cent. 4, obser. 7 and Decius, 3, consult. 21.

of vengeance. This reason does not seem satisfactory to me, especially as applied to time of war (when, in Livy's words, if you make never so small a delay at the critical moment, when opportunity is flying by, you will vainly try to repair the omission afterwards). Nor is the reason sound in law, for the only difference between peace and a truce is that the one is perpetual, the other temporary, but the time involved neither intensifies nor diminishes the quality of the obligation. And exactly as peace is destroyed when one or the other party breaks faith, so also the dissolution of a truce is held to result, for, underlying each case is a common factor, i. e., a breach of faith; and no one ought, by his own guile or delict, to be a gainer or cause injury to others.

Dig. 49, 15, 19, 1.  
Gell. bk. 1, ch. 25.  
Dig. 44, 7, 44, 1; and  
45, 1, 122, 1.

c. 13, X, 2, 1, and  
[c. ille novit] and  
c. 2, X, 1, 34.

Dig. 19, 2, 54, 1.

And, unless I mistake, there is a neat response of Paulus which fits this case. The facts were that a lessor had covenanted with a lessee, under a penalty, that he should not be ejected during the term. Paulus held, however, that if the lessee was in arrears with the rent for two years, the lessor could eject him without incurring the penalty, even if there had been no mention of the rent in the penal stipulation.

Cod. 4, 48, 3.  
Dig. 50, 17, 134, 1;  
and 24, 1, 3, 1.

[19] For these reasons I am inclined to side with those who think

Pan., Imo., Alex.,  
Decius, Aleiat., Bell.,  
Cor., whom Mynsinger  
cites, cent. 4, obser. 7.

that the same legal principles apply to a truce as to peace and treaties, especially so since a truce also may extend over a long period of time.

Gell. bk. 1, ch. 25.

We read that the people of Veii were granted a truce of a hundred years by Romulus, one of forty years by Servius Tullius, and one also of forty years by the consuls Lucius Furius and Caius Manlius, and a truce is reported to have been made with the people of Cære for a hundred years.

Petr. Bell. de re  
milit., par. 5, tit. 3.  
Livy, bks. 1 and 2.

Livy, bk. 7.

And when the Volsinians were weary of war a truce for twenty years

Livy, bk. 5.

was granted them. The Tarquinians were driven by fear to crave a

Livy, bk. 9.

truce for forty years from the consul Decius. The Æquians obtained a

Livy, bk. 4.

truce for eight years. When the chief powers of Etruria (the Volsinians, Perusia, and Aretium) begged for peace, they secured a truce for

Livy, bk. 11.

forty years.

We read accordingly that the Romans treated a breach of a truce as a cause of war just as much as a breach of a treaty, and they were people who always observed the laws of war most religiously. And so they went to war with the Samnites in the same year in which they had

Livy, bk. 9.

granted them a two years' truce, because they had broken the truce. And they brought to a successful issue a war with the Etruscans, who in reply to a request for peace and a treaty with the Romans had received a grant of a thirty years' truce, yet had reopened the war a very little later in

Bk. 9.

flagrant breach of sworn truce. And in the same year, says Livy, the consul Fabius engaged with the rest of the Etruscans near Perusia, which had itself committed a breach of sworn truce; his victory was neither dubious nor difficult, and he would have captured the town also (for he marched near the walls after his victory) had not envoys come out to

Bk. 11.

surrender the town. The same writer, Livy, tells in another place how

the Romans made war on the Etruscans for making military preparations in breach of a truce. (Peace had been refused them, but they had been granted a truce for two years.)

There is this additional point, that greater sanctity attached to a treaty, which was made by aid of an imprecation\*, than to a truce or other kind of agreement (*sponsio*). A treaty, accordingly, could not be concluded without a mandate of the people, or without the *fecials* and other solemn ritual, but we read that truces and other kinds of agreement were frequently made by generals without the *fecials* or other solemnity and without any mandate from the people. In the next chapter we shall show this at greater length. Livy, bk. 9.

And yet nothing (says Cicero) could be sacrosanct save what the plebeians and people (*plebs populusque*) had sanctioned and what had been rendered sacred either by its nature or by the solemn testimony of a statute or of a penalty whereby any offender is made *sacer* (i. e., outlaw). Well, then: if a treaty, which possesses a higher degree of sanctity, ceases to bind when the other party breaks faith in regard of it, much more is this the case with a truce. In orat. pro  
Corn. Bal.

No blame, however, attaches to those who during a time of truce receive provocation at the hands of a wrong-doer, yet abstain from all form of retaliation (especially where the damage in question has been but slight and temporary) with the idea of throwing on the enemy all the disgrace of breaking faith. This, however (Alexander asserts), is rather a matter of use and custom than a counsel of law. Consistent with it is the conduct of Scipio on an occasion when the Carthaginians not only had perfidiously broken a truce, but also had violated the Law of Nations in the person of his envoys. Scipio, nevertheless, declaring that he would do nothing unworthy of Roman institutions or his own character, let the envoys of the enemy, who had come to him at Rome at that juncture, return inviolate. By so doing Scipio earned much praise, but (if we must pronounce a verdict) he was bound to spare the Carthaginian envoys, no matter that the truce had been broken with the dastardly duplicity that appears in Livy's narrative. What was open to him was to renew the war (as in fact he did) without any stigma of perfidy; but he could offer no violence to the enemy's envoys, they being protected by the Law of Nations and declared inviolable and sacred, apart from any agreement for peace or a truce and even in the heat of war. And it is immaterial that the enemy have already broken a truce and done violence to envoys sent from the other side to them. Cod. 2, 3, 21.  
Livy, bk. 30.  
Dig. 50, 7, 13.

[20] Now, what we have said about not being bound to keep faith with one who breaks faith, must be limited to one and the same agreement which has been broken, and to matters included in one and the same *sponsio*, and to promises where the moving consideration of each party's promise is the promise of the other party. For things that are

Alciat. on Cod. 2, 3, 21, nu. 31.

Alex. on Cod. 2, 3, 21. Dig. 4, 3, 36 and Accurt. thereon.

\* See following chapter, section 4.

c. 3, X, 1, 2. mutually dependent are to be judged upon one and the same principle; Dig. 43, 16, 18. but it is otherwise with things that are independent of each other. Accordingly, an offender against one law is not deprived thereby of the benefit of another law; and a man who is the instituted heir under an earlier will, but a substituted heir under a later will, may renounce the inheritance under the earlier will and enter under the later one. Dig. 28, 6, 12.

[21] In war, accordingly, even though you have a perjured, treaty-breaking foe to deal with, and one who has once and again and repeatedly played you false, yet you may not break your faith in return. This admits an exception (as already shown) when your enemy makes it impossible for you to perform what you have sworn—in all other cases it was always held a deep disgrace to requite perfidy with perfidy. In this connection Lucullus fell into disrepute. The Lusitanians had broken a treaty and made war, and Lucullus, surrounding them by a stratagem and in breach of his pledged word, had them all put to death with the utmost cruelty, after the fashion of barbarians and without any regard for the dignity of Rome. And Servius Galba was accused before the assembled people by Libo, tribune of the people, for that, while prætor in Spain, he had, despite his sworn pledge, put to death a large body of the Lusitanians, when that tribe was renewing the war in breach of treaties.

Appian,  
Span. war.

Val. Max., bk. 8,  
ch. 1.

[22] Lastly, a compact whether of alliance or of peace or of truce, is void if it has been obtained by fraud, for such agreements as are invalidated by fraud are not upheld by the prætor, and fraud inducing a *bonæ fidei* contract (i. e., one of a certain group of contracts in Roman law) makes the contract null by mere operation of law subject to this that the deceived party may, in his discretion, elect whether to affirm the contract or not; but the other party, who has committed the fraud, has no voice in the matter, for no one, by his own guile, may profit himself or injure others. The bad faith of one of two contracting parties subjects the fate of the contract to the discretion of the other party. Dig. 2, 14, 7: 7 and 9. Dig. 4, 3, 7; and 4, 4, 16, 1. Cod. 2, 4, 26. Cod. 4, 48, 3; and 7, 8, 5. Dig. 18, 1: 62 and 57. And 19, 1, 13, 5. And 17, 1, 60, 4.

We read, however, in Holy Scripture, how Joshua treated the Gibeonites. They were a neighboring people, belonging to a land which the Lord had promised to the Israelites; but, in order to secure peace at the hand of the Israelites, they had lied that they were strangers from a very far country. Joshua was deceived by this fraud, but when he discovered it he decided that the peace which he had granted could not be revoked, lest he should allow himself to commit the same perfidy which he was reprobating in another. However (to quote St. Ambrose), on that occasion Holy Scripture uttered, not the ancient formula of the jurisconsults concerning fraud, but the opinion of the Patriarchs. Moreover, though Joshua took the Gibeonites out of the hand of the Children of Israel so that they were not put to death, yet he cursed them for their deceit and ordered that they should be servants to the congregation, every one of them. Joshua, ch. 9, c. 23. C. 22, qu., 4. Offic., bk. 3.

Joshua, ch. 9. every one of them.

CHAPTER VII.  
*Of treaties and truces.*

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| <ol style="list-style-type: none"> <li>1. Three kinds of treaty.</li> <li>2. Usual to insert in a treaty, for what it is worth, clause <i>Majestatem comiter conservare</i> (i. e. courteous recognition of superiority).</li> <li>3. The Romans' custom not to make a treaty with an armed enemy.</li> <li>4. The difference between a treaty (<i>fœdus</i>) and a sponsion (<i>sponsio</i>).</li> </ol> | <ol style="list-style-type: none"> <li>5. A general can not make peace with the enemy without his prince's authorization.</li> <li>6. Does this prohibition apply to truces?</li> <li>7. Can a prince grant away private property on grounds of public expediency?</li> <li>8. The prince is bound by the law of nature.</li> <li>9. How far kings are owners paramount.</li> <li>10. Whether a prince is bound by a treaty struck with his predecessor.</li> </ol> |
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[1] Now concerning treaties wherein we pledge our faith to an enemy, be it remarked that in olden days three classes used to be made of those treaties whereby states and kings formally bargained for each other's friendship. Menippus, the envoy whom Antiochus sent to Rome about peace, lucidly discoursed of this to the consul Titus Quintius. The first class was that in which terms were dictated to the vanquished in war. For since all their property had been surrendered to the stronger in arms, it was within his right and discretion to say what part thereof he purposed as victor to keep and in what to mulct them. Livy, bk. 44.

Such was the treaty which was granted to Æneas after he had fled from Troy and was begging for peace from the pursuing Greeks. The terms were that Æneas and his allies and all the property which they had carried off with them should quit Trojan soil within a specified time and that their fortresses should be delivered into the power of the Greeks. Dion. Halic., Rom. antiq., bk. 1.

Another example is the treaty made by the Romans with the Æquians, the conditions of which were: The Æquians, retaining their territory intact, are to become subjects of the Romans; they are to send nothing to the Romans save troops as often as summoned and then at their own expense.

Such also was the treaty which the Apulians obtained from the Romans, for they did not enter into it on equal terms (as Livy says), but as being under the sway of the Roman people. Dion. Halic., Rom. antiq., bk. 9.

Of the same class, too, is the treaty in which Philip was bidden to withdraw his guards from all the towns of Greece, to surrender his fleet and elephants, and to pay a thousand talents to the Roman people, and was forbidden to make war outside Macedonia without the Senate's authorization.

Livy, bk. 43.

So also was the treaty by which Antiochus, after the whole of Asia this side of Mount Taurus had surrendered to the Romans, was to hand over his fleet and its equipment and pay twelve thousand Attic talents, over twelve years, by equal instalments.

Livy, bk. 48.

The second class of treaty was that in which combatants of equal strength in war entered on equal terms into a treaty of peace and friendship.

Such was that which we read of as struck between Romulus and Tatius, King of the Sabines; there had been three drawn battles between them, with very great slaughter on either side; so the wives of the Romans, who were of Sabine origin and about whom the war had arisen, intervened, and the combatants elected to end the war by a treaty rather than by fighting; this treaty provided that Romulus and Tatius should reign jointly in the City with equal power and honor and that the rights of Roman citizenship should be given to the Sabines.

Dion. Halic., Rom. antiq., bk. 2.

Dig. 49, 15: 12. (pr., and 20).

Now in this kind of treaty it is usual to arrange on equal terms for mutual return of prisoners, restoration of towns and the like; accordingly in the treaty between Octavius Cæsar, Antony, and Pompey it was agreed that there should be a cessation of hostilities by land and by sea and that the contracting parties might freely come and go everywhere; also that Pompey should withdraw his garrisons from every place in Italy, that he would not receive any more fugitive slaves, that he should rule over the islands of Sardinia, Sicily, Corsica, and the others which were then in his possession, and receive the Peloponnese into the bargain, and that Cæsar and Antony should possess what was left.

Appian, Civil war, bk. 5.

And of this kind, too, the treaty seems to have been in which the Romans granted peace to the Ætolians, upon the following conditions: The Ætolians are to recognise the empire and superiority of the Roman people without fraud and are to have the same enemies as the Roman people, bearing arms and making war upon them side by side. For, although the treaty in question can not be called one on equal terms, yet it was not a case where conditions were imposed on the vanquished or they were deprived of anything, but they were left in the free enjoyment of their own laws.

Livy, bk. 48.

Dig. 49, 15, 7.

Again, the third class of treaty was that in which peoples who had never been enemies knitted themselves together by a bond of alliance and entered into a compact of friendship. It is not usual for peoples in such a case either to impose or to receive conditions (for that would be between conquerors and conquered), but they framed certain conditions for the alliance and friendship on which they were entering. Such was the treaty which Latinus made with Æneas, when the Trojans were admitted into a part of his territory. He bargained that they should coöperate with each other in the war which they were preparing to wage against Rutilus and that each would assist the other to the utmost of his

Dion. Halic., bk. 1.

This is also the place to mention the treaty in which friendship was inaugurated with the Latins, during the consulship of Postumius Cominius and Spurius Cassius; for, though it appears, from Dionysius of Halicarnassus, that the Latins had formerly been subject to the Roman sway, nevertheless the faithful services which they rendered to the Romans led to their being subsequently united to them by a treaty of alliance, which ran as follows: "Let there be a mutual peace between the Romans and all the peoples of Latium so long as heaven and earth stand fast, and let neither make war on the other or bring enemies from any direction upon him, and let them not afford safe passage to invaders; let each render aid with all his might to the other when molested by war and let them share booty and spoils equally." These same Latins, however, repeatedly renewed war in subsequent years and were at length crushed by Camillus and reduced into the power of the Roman people. Bks. 3 and 4.

[2] A treaty can also be classed here by which some province or city places itself under the guardianship and protection of some foreign prince or joins some kingdom or republic on specified conditions. For, as Proculus ruled, it remains a free people whether the treaty of friendship is drawn on equal terms or whether it includes the formula that the people in question consents to a courteous recognition of the superiority of the other people. For the object of the addition of this formula is to show that the one people is superior to the other, but not that the latter is unfree; and that is the force which Cicero attributes to the clause "majestatem comiter conservare," which was common form in Roman treaties. Dig. 49, 15, 7. Doctors on Dig. 13, 7, 4. Franc. Ripa, Consult. 55. Socin (grandson), consult., 6, p. 1.

This third kind of treaty can be divided into two kinds according as the treaty is a purely defensive one or is both offensive and defensive (to employ the current phraseology), i. e., is designed both for resisting and for making war, and this can be framed either so as to refer to all the rest of the world, so that the allied peoples have exactly the same enemies and the same friends, or it may be made with specified exceptions. Orat. pro Corn. Balb.

With this class may also be grouped treaties the object of which is purely commercial and which provide free ingress and egress for merchants and which can exist even between enemies.

[3] It was, however, a principle of the Romans never to enter into a treaty with an armed enemy, nor were they wont to exercise over any even a peaceful rule, unless they had made surrender of everything, whether divine or human, and had admitted a garrison or, lastly, were bound by an alliance or a treaty. For it was ever a matter of strict solicitude with the Romans, not to give the appearance of submitting to demands under hostile pressure. Accordingly, the consul Spurius Cassius told the envoys of the Hernicians, when they asked for peace, that they must first comport themselves in a manner befitting a beaten and Dion. Halic., bk. 8.

subjugated people and that only so could they make their requests for friendship.

Dion. Halic., Rom. antiqu., bk. 8.

The consul Titus Largius, too, told the Fidenati, when they applied for a truce, that before they could get an audience they must lay down their arms and open their gates, and that apart from so doing they had nothing to hope for from the Roman people in the way of peace or truce or anything else of a humane and moderating character. So, also, after the consul Albinus had been put to flight with heavy loss, Pyrrhus so much admired the Romans because they made no mention of a peace that, although he was the conqueror and had received large reinforcements, he made the first advance and proposed peace on quite equal terms, with liberation of prisoners, and offered the Roman people his help in the subjugation of Italy, and all he asked in return was safety for the Tarentines and their friendship for himself. The answer, on the advice of Appius Claudius Cæcus, ran, that Pyrrhus must first quit Italy and that then, if it suited him, he might treat for friendship and alliance, but that as long as he remained under arms the Roman people would fight him, even if he had beaten a thousand Albinuses.

Dion. Halic., Rom. antiqu., bk. 5.

Plut., Life of Pyrrhus. Val. Max., bk. 8, ch. 13. Cic. on Old age.

In the same way, when the Ætolians sought peace, the consul Marcus Fulvius replied that he could not entertain any suggestion of peace from them until they were disarmed and that they must begin by surrendering all their weapons and horses and then pay a thousand silver talents to the Roman people.

Livy, bk. 48.

And when Vermina, son of Syphax, sent a mission to beg that he might be styled king and their ally and friend, the answer was that he must sue for peace from the Roman people before he could be styled king and their ally and friend.

Livy, bk. 51.

[4] Again, arrangements such as we have been considering are not always made by treaty, but sometimes also by sponson. The following passage from Livy shows what the difference was between the two:

“When the consuls went to Pontius to confer with him, he began to talk about a treaty in the strain of a conqueror; but they declared that such could not be concluded without an order of the people, and the ministry of the fequals, and the other customary rites. Accordingly, the Caudine peace was not effected by a treaty, as is commonly thought, and asserted by Claudius, but by a sponson. For what occasion would there be either for sureties or hostages in the case of a treaty, where the business is effected by the imprecation, ‘Whichever nation shall cause the said terms to be violated, may Jupiter strike that nation even as the pig is struck by the fequals’? Now the consuls, prefects, legates, quæstors, and military tribunes became sureties in this case, and the names of all the sureties are preserved; whereas, had the business been transacted by a treaty, none would have appeared but those of the two fequals. Further, on account of the delay necessitated by the treaty itself, six hundred

horsemen were demanded as hostages, who were to suffer death if the compact were not fulfilled."

Now, just as the sovereign prince alone may set warlike enterprise on foot and make war and collect an army and summon a levy, so also the opposite matters of making treaties and truces with the enemy are functions also reserved to the sovereign, as we have shown above.

Dig. 48, 4, 3 and above, on just war.

[5] Accordingly, a peace can not be set up by generals without the consent of the prince or people in whose behalf and under whose management the war is being waged. In olden days this was provided for by the feclia law and later by the *Lex Julia* about the provinces and the *Lex Cornelia* about treason. For, without authorization by the people and initiation by the Senate (all whose power has been transferred to the prince) nothing could be solemnized so as to bind the people. And indeed if, in civil and forensic business, an agent who has been appointed with general authority to carry on an action has no power to compromise and settle the case, it follows that one who has been appointed to the command of an army in order to carry on a war exceeds the limits of his functions if he makes peace with the enemy, and such excess was always considered an extremely grave blunder in military matters.

Cicero against Piso.

Dig. 1, 4, 1.

Cic. pro Corn. Balb.

Dig. 3, 3: 60 and 63.

Dig. 49, 16, 3, 15.

It was on that account that the Senate refused to ratify the peace of Caudium made by Titus Veturius and Spurius Postumius, and the treaty concluded by Caius Mancinus with the Numantines. And in just the same way the dictator Camillus repudiated the agreement entered into between Sulpicius, a former military tribune, and Brennus, the Gallic chieftain, by which it was agreed that the Gauls should receive a thousand pounds of gold from the Romans and raise the siege. The refusal of Camillus was based on the ground that the agreement had been made by an inferior magistrate subsequently to his own appointment as dictator and without his authorization; for the dictator exercises sovereign power.

Livy, bk. 4.

Pompon. in Dig. 1, 2, 2.

And Sallust, speaking of the agreement made between the Roman general Aulus and Jugurtha, King of the Numidians, said, The Senate decreed (as was correct) that no treaty could be made without the joint consent of the people and itself.

From the foregoing it is clear that no one can, apart from the prince's authorization, come to terms with an enemy without committing the offense of treason, for this is a matter of sovereign prerogative. On this ground more than on any other Bodin thinks that the execution of Louis, Duke of Orleans, was justified, because he had made a treaty with the Duke of Lancaster without authority from the King of France. Accordingly, I can not agree with Duarenus (whom others follow) when he declares that the opinion just cited is sound in the case of one who has only been intrusted with the business of leading and governing the army, but unsound in the case of one who has been invested with full and free power over everything.

Dig. 2, 14, 5.

Repub., bk. 7.

On Dig. 2, 14, 5.

Duarenus holds that the latter person has even the power of making peace with the enemy; but I can not admit this. For matters of public and royal right rest on a different basis from that on which private rights rest and they can not be shared with private persons, as was shown in an earlier chapter. And so, no matter how full and free be the general power which is allowed to a commander, I do not think that the power of making peace with the enemy is meant to be granted to him, for matters of royal prerogative do not pass under general words, but require nothing less than an express and special grant.

Now in this case if the commander or general has received an express grant of power to solemnize a treaty (which would be very unusual), he can not go beyond his mandate or delegate his power to another, for he has not got it in virtue of his magistracy and command, but he has a mere right of proceeding under the law and therefore (in Julian's words) he does not do anything of his own right, but in right of him who gave the mandate. For, as already said several times, the power of peace and war resides in the sovereign and can not be transferred to another.

And so, beyond question, when the Roman consuls, in whose hands the highest authority was lodged, took command of an army, they had indeed power to carry on war and to harass and attack the enemy at their discretion and also autocratically to control military discipline, but the making and the ending war, apart from the authorization of the Senate and the command of the people, were beyond them.

Accordingly, the phrase employed by Livy is that the Senate, on the command of the people, decreed that Publius Scipio, subject to the opinion of the ten envoys, should make peace with the people of Carthage on such conditions as seemed good to him. Similarly, full discretion with regard to peace and war with Philip was intrusted to Titus Quintius. So also peace was granted to the Etruscans on such terms as the consul Lucius Æmilius should think best, and to the Æquians at the pleasure of the consul Quintus Fabius. And we read that this was a frequent practice of the Romans, for they were well aware that no one was better able than a commander to form a correct estimate of the intention with which proposals of peace were made and of the general position of affairs.

[6] Now it has been generally held that the doctrines which have been laid down about peace apply equally to truces, although Bartolus dissented on the ground that this is to make a departure from the analogy of mandate, as in the foregoing case, seeing that in civil business an agent is not allowed to give one's opponent an extension of time for payment any more than he is allowed to make a compromise with him.

And this is the view I myself take, so far as truces of long duration are concerned, which are rather by way of putting an end to the war—a

By inference from Dig. 3, 3, 58 and Cod. 1, 50, 2. And Bartol. thereon, and on Dig. 32, 1, 2.

Fig. 1, 1, 1, 2; and 2, 14, 5. Conmanus excellently, bk. 5, ch. 1.

Leading text in c. 4, X, 1, 30, and in Dig. 1, 21, 1—the Doctors also—and in Feud. law, ii, 56. Molin. on custom of Paris, tit. 2, sec. 1. Gloss. 5. Text in Dig. 49, 14, 30.

Dig. 1, 21, 3.

Bk. 40.

Livy, bk. 42.

Dion. Halic., Rom. antiq., bk. 9.

On Dig. 2, 14, 5.

Dig. 45, 1, 122, 1. Duaren. on Dig. 2, 14, 5.

function reserved to the sovereign—than procuring a cessation of hostilities. We read accordingly that truces of that kind were never granted by the consuls and other Roman commanders, but by the Senate and the Roman people. Thus the Samnites, after their defeat, obtained a truce for two years instead of the treaty which they were suing for. In the same way truces for several years were granted by the Senate and the people to the Veians, the Volsinians, the Æquians, and a great many others.

Livy, bk. 9.

Livy, bks. 2, 4, 7, 9, and 10.

I hold, however, that it is competent for generals to make with the enemy that variety of truce which takes effect at once and holds good for a short time only, putting a stop to attacks on both sides—and this is the variety that Paulus deals with—and my reason is that these truces do not put an end to the war; for though the fighting stops, the war continues. This is especially the case where the truce is rendered desirable by some crisis or is otherwise necessary or expedient. For the grant of authority to a general to harass and attack the enemy at discretion gives him competence in all administrative matters which concern the war.

Dig. 49, 15, 19.

Gell., bk. 1, ch. 25.

Roman generals, accordingly, were wont of their own authority, when the enemy sought for peace, to grant a truce during which envoys might be sent to Rome to prefer the request for peace. And so Scipio allowed the Carthaginians a truce for three months, during which their envoys might treat for peace at Rome. And the same thing happened when Libo and Bibulus, of the faction of Pompey, were stationed with their fleet at Oricum and found themselves reduced to great straits through lack of necessaries. They expressed a wish to discuss matters of great moment with Cæsar, giving the impression of being about to suggest an arrangement; and they obtained a truce for the time being from Marcus Acilius and Statius Murcus, Cæsar's representatives—the one of them was in charge of the town-walls and the other of the land-garrison—for the proposals made were of obvious importance and such as Cæsar was known to be very desirous of receiving.

Livy, bk. 40.

Caes., Civil war, bk. 3.

Further, generals have, not infrequently, themselves laid down the conditions of peace and then, when these have been favorably received by the enemy, have granted a truce to allow of envoys being sent to Rome to submit the question of peace to the Senate. This was the course adopted, with much success, by Scipio in the case of the Carthaginians; and it was on his initiative, too, that his brother, Lucius Scipio, after the defeat of Antiochus, proffered terms of peace and allowed the despatch of an embassy to Rome about the matter. Titus Quintius, also, granted a truce for six months to Nabis, tyrant of Sparta, to allow time for the confirmation by the Senate of the terms of peace laid down by himself; and on another occasion he granted a truce for two months to Philip and allowed him to send a mission to Rome to treat about the terms of peace which they had already been discussing. And the Senate would often

Livy, bk. 40.

Livy, bk. 47.

Livy, bk. 44.

Livy, bk. 42.

follow the advice of a general in granting or refusing a peace which the enemy sought, as just said.

There have been peoples, however, who have not allowed their generals so much latitude. We read, accordingly, how a truce for four months had been agreed on between Agis, King of Sparta, and Thrasybulus and Alciphron, Argive generals; but on the proposal of Alcibiades the Argives refused to ratify the agreement and the Spartans also treated it as null. And Thucydides tells us that this episode made the Spartans so angry with their king that a law was introduced providing him with a body of twelve counsellors, apart from whose advice no truce or treaty of any kind could be entered into with the enemy. It is, however, notorious that the kings of Sparta had no sovereign power and no unfettered discretion.

Dion. Halic., bk. 2.  
Bodin, Method.  
hist., ch. 6.

[7] But now, suppose that a prince who has received from his

people a grant of all their power and sovereignty, makes a proper and

expedient agreement touching a matter of State concern—whether a peace or some other treaty made with the enemy—the question has been raised by jurists whether in thus making peace with the enemy he can condone all private hurts and losses sustained by reason of the war and even make a grant to the enemy of the property of his subjects.

Dig. 2, 14, 5, and  
Cod. 7, 37, 3.  
Fern. Vasq.,  
bk. 1, ch. 4.

Now no doubt can arise with regard to things captured by the enemy during the war, because the law of war vests these in the enemy, quite apart from any agreement with the prince, and the same holds, too, of hurts and losses caused under the laws of war. But what about other things which have not been acquired by the enemy or which have been seized by an "unjust" enemy? They, too, can be taken from their private owners and granted to the enemy if no other measures can be adopted to secure public safety, for public safety must come before

Authentica, Res  
quae, Cod. 6, 43, 3  
(Nov. 39, 1).  
Dig. 17, 2, 65, 5.  
Cod. 6, 51, 16.

private advantage, or (as Pliny puts it) public interests must be preferred to private, and eternal interests to mortal. This is the idea underlying the remark of Tacitus that every great achievement contains an element of injustice in so far as public gain is relied on to counterbalance private loss. And so, when Thrasybulus had freed Athens from the excesses of the Thirty Tyrants he had a *plebiscitum* (decree of the people) enacted to prevent the raking up of bygones; and this forgetting of wrongs (called in their tongue *ἀμνηστία*) reestablished the shaken and tottering State in its original position. And Cicero thought that this was an example which at times might well be followed at Rome with the object of furthering the public peace.

Val. Max., bk. 4,  
ch. 1.

Philipp. 1.

Epist., bk. 7.

And this is, admittedly, more than ever necessary in the case of property which has been wrongfully taken possession of and enjoyed for a considerable tract of time, for if such property were taken out of the hands of its possessor and restored to the original owner there would inevitably be a great upsetting and disturbance: and this was the very

sound opinion which, in a not dissimilar instance, the Emperor Trajan embodied in a rescript when consulted on the point by Pliny. But otherwise, and except in cases of imperative necessity and where great advantage will accrue to the State, a prince may not take his subjects' property away from them; so to do would be repugnant alike to natural and divine law.

[8] For, however much a prince may be freed from the yoke of the law, yet all kings and princes (as Pindar said) are subject to the law of nature; and ample as the power of a prince may be, yet it does not extend to acts of injustice; and what Pliny wrote to Trajan is in point in this connection: "Just as it is the essence of happiness to be able to do as much as you want to, so it is the essence of greatness to want to do just as much as you can." Rescripts of princes, accordingly, ought to receive such an interpretation as will enable them to be carried out without detriment to others and those which are in conflict with the rights of another are invalid. Accordingly, the gift of the duchy of Milan, made by the Emperor Maximilian to King Louis XII of France, led to war, because of the right which the Sforzias asserted to that duchy and which the Emperor is not taken to have intended to give, nor could he.

[9] For, however much kings may be styled lords of all, this is to be interpreted as referring to sovereignty and power and not to ownership and possession, which are matters affecting private parties. And this was neatly put by Seneca, where he says, "Power over everything belongs to kings, and to individuals property." Or a little later: "The king possesses everything in sovereignty, individuals possess everything in ownership; for everything is in the sovereignty of Cæsar, but what is owned by individuals is in their patrimony."

And Cicero tells us that Aratus of Sicyon deservedly gained much praise on this ground. He had freed his country, which for fifty years had been in the hands of tyrants, by the overthrow of the tyrant Neocles, and had restored large numbers of exiles; now the property of these persons had got into the possession of others, and Aratus found that much of this property had for a long time been enjoyed by right of inheritance, and much by right of sale, and much by right of dowry; and that on the one hand it could not be taken away from the possessors without inflicting wrong on them, and that on the other hand the former owners would be dissatisfied. So he obtained from King Ptolemy the help of a large sum of money and joined to himself a council of fifteen notables, with whose assistance he examined the cases, both of those who were in enjoyment of the property of others and of those who had lost the possession of their own property; and in the end he succeeded, by assessing the money value of this property, in persuading some to prefer to take cash and cede their property to its possessors and in persuading others to think it better to be paid a money equivalent than to reclaim

their property. The upshot was that harmony was established and that all went off without complaining.

In like manner Brutus and Cassius, after Cæsar's death—seeing that it had been resolved that his acts should be ratified by the State—ordered that the former owners of lands of which they had been deprived by Sulla and Cæsar in the civil wars should at any rate be paid a price therefor out of the public funds. Thereby these persons were appeased and others were made more secure in their possessions.

Appian, Civil war, bk. 2.

[10] One further question remains, whether on the death of a prince with whom a treaty has been struck, the treaty subsists with his successors. Now as regards other contracts it is held that a distinction must be drawn according as the succession passes by way of inheritance—in which case the successor is by the very fact bound by the contract of the deceased—or under some statute or by election, in which case he has not to answer for what was done by the deceased. For a personal obligation does not extend to any other successor than an heir, not even if a man has expressly promised for himself and his successors.

Cod. 3, 32, 14.

Dig. 18, 1, 81, 1; and 36, 1, 1, 16.  
Cod. 4, 16, 7.

Dig. 45, 1, 38.

As regards treaties, however, and other public agreements into which a man enters not on his own behalf, but on behalf of the State (which is just as effectually represented by subsequent officials as by those of to-day), we must declare that a prince is entirely bound by his deceased predecessor's contract and that the parties to the treaty continue to be subject to it. The Veians and the Fidenates, therefore, in the reign of Tullus Hostilius, had not any just cause for reopening the war; nor had the Latins who, in the reign of Tarquinius Priscus, assumed that the death of Ancus had freed them from the bond of the treaty; nor had the Etruscans who, on the death of Tarquinius Priscus (to whose power they had submitted themselves) declined to abide by the terms of the treaty any longer. And the Romans were quite justified in declaring war on Perseus when he gave out to their envoys that the treaty made with his father Philip had nothing to do with him.

Dig. 5, 1, 76.

c. 1, X, 2, 9, and doctors thereon.  
And c. 59, C. 16, qu. 1. Jason and others on Dig. 1, 4, 1, col. 3. Note on c. 4, X, 5, 4.

Dion. Halic., Rom. antiq., ch. 3 and 4.

Livy, bk. 42.

It is, however, the general opinion that if such a treaty is a cause of very great injury to the State, the succeeding prince is not bound by it. Herein I agree, provided that the treaty relates to the transfer of something appurtenant to the royal crown and has been made without the requisite consent of the people or estates, or if the treaty derogates from the royal prerogative, for the deceased prince would not be competent to effect this; and such a treaty would be quite devoid of force right away from its inception.

Cyn. and doctors on Cod. 1, 14, 4. Bald. on Feud. law, c. i, 7.

c. 1, X, 3, 19. And c. 20, C. 12, qu. 2. And generally in Joan. Papon., Arrest. 5, 10.

c. 20, X, 1, 6.

Above, ch. 6.

From the foregoing it is clear that the most effective treaties are those which are entered into on both sides by both king and people. This is illustrated by the reply of the Hernicians when Roman envoys made expostulations about their wrongdoings and robberies. The reply was that no treaty had ever been made between themselves and the Roman

people, and that the treaty made with King Tarquin was in their opinion at an end by reason of his exile and death. So also when Edward IV of England, after his expulsion from the throne, sought aid from the King of France pursuant to a treaty: the answer came that the old treaty was between king and people on either side and that, therefore, after Edward's expulsion, the treaty remained in force with the people and the then reigning king. But when the exiled Tarquins made war on Rome, the Latins refused to help either side on the ground that their oath forbade them to make war alike on the Tarquins and on the Romans, seeing that they were equally bound to both sides by the treaty.

Dion. Halic., ch. 8.

Bodin, *Repub.*,  
bk. 1, ch. 7.

Dion. Halic., bk. 5

## CHAPTER VIII.

*Of trickeries and deceit in war.*

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|
| <p>1. Trickeries are permissible in warfare.<br/>         2. What is permissible deceit.<br/>         3. Stratagems are praiseworthy in a general.<br/>         4. The old Romans disdained all deceptions.</p> | <p>5. The ancients sometimes found the mere reputation for untarnished good faith more useful than arms.</p> |
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c. 2, C. 23, qu. 2. [1, 2] In the conduct of war, says St. Augustine, it is indifferent from the standpoint of justice whether the fighting is all open and above-board or whether trickery be used. And Ulpian declares that it is permissible deceit (what the ancients understood as shrewdness) to devise contrivances against an enemy or a brigand. Accordingly, that excellent general, Lysander, used to say that where lion-skin ran short fox-skin must be patched on. And the poets feigned that Hercules carried instead of arms the skin of the Nemæan lion and arrows dipped in the gall and blood of the Lernæan Hydra, as if to show that a good commander ought to make use at the same time alike of cunning and of bravery; and that is the purport of Virgil's

Dolus an virtus, quis in hoste requirat?  
 (Guile or valor, what matters it in an enemy's case?)

And this is a correct idea, provided the claims of good faith are respected, for we ought not to be like the tyrant Dionysius, who used to say that boys are duped by dice and men by oaths; or to copy the Persians, who paid no heed to good faith, both in words and in deeds, save so far as it suited them. On the other hand it is recorded that Joshua laid an ambush for his enemies on the command of God himself.

And praise has been awarded to the stratagem of Pittacus of Mitylene (one of the seven wise men), which was as follows: He was entering on a contest with Phryno, an Athenian general, who had a little figure of a fish on his helmet, and so he took a net out into the arena and, saying that he was going a-fishing, he coiled the net round Phryno in such a way that he could not free himself and then slew him.

It was, therefore, a just remark of Agesilaus that, while the breach of a pledged word was impious, it was not only quite right to deceive an enemy, but pleasing, too, and profitable. And in Xenophon we have Cambyses replying to Cyrus' question, "What was the best way to secure victory," that in the quest of victory the foe must be trapped in every possible way, and tricked by hidden snares and guile and fraud, and worn

down by theft and rapine. Thus an opportune lie on the part of a general has sometimes given him the victory, as in the case of that lie of Valerius Levinus who, having his sword bloody with the slaughter of a private soldier, shouted out that he had slain Pyrrhus and thus caused such consternation to the Epirotes that they fled to their camp with all speed, panic-stricken and weeping. In the same way when the consul Titus Quintius was fighting with the Volscians and his men were giving way, he resorted with success to a falsehood and cried out that the enemy were in flight on the other wing, and thus he got his men in hand again, led them to the attack, and conquered those who imagined they were conquerors.

Livy, bk. 2.

[3] Indeed, stratagems of this kind bring as a rule very great praise and glory to a general. Now in this fashion of plotting and tricking Philip of Macedon was reckoned an adept, for he took much more pleasure in outwitting an enemy by a ruse than in beating him on the open field, saying that a victory won by guile and cunning never cost any lives of his soldiers, while that kind of victory which comes from the foughten field is ever a bloody one. The Carthaginians, too, and pre-eminent among them Hannibal, and the Greeks plumed themselves on their skill in such trickery and deceit, and no blame would have been imputable to them had they not at the same time made so little of breach of faith.

[4] Those old Romans, however, disdained all such frauds and deceptions and had no wish to conquer save by sheer valor and downright force—what they used to call Roman methods. But the Romans of a later day discarded this maxim of their ancestors and were quite ready to call the arts of duperly and deceit to the aid of themselves and the State. And so when Quintus Martius and Aulus Attilius returned from the mission on which they had been sent to Perseus, King of Macedonia, they made it a matter for especial boast in the Senate that they had fooled the enemy by means of a truce and the hope of peace, for his preparations for war were so complete, as contrasted with their own utter unpreparedness, that he could have occupied all points of vantage before their army could be transported into Greece; if, however, the period of the truce were utilized he would lose all his superiority in preparedness and the Romans would begin the war better fitted out in all respects. Livy tells us that the majority of the Senate approved of this as a sound bit of business; but these novel tactics found less favor with the greybeards, who called to mind the usage of days gone by; they failed (said they) to recognize Roman methods in this embassy, declaring that their ancestors' manner of warfare was not by ambushes and nocturnal fights, nor by simulated flights and sudden returns upon an incautious foe, nor by vaunting craft rather than true valor; and that they were wont to declare war before waging it, nay to do so with all solemnity by messengers, and sometimes to indicate the precise spot for

Bk. 34.

conflict. It was (said they) this same good-faith that informed Pyrrhus of his doctor's plots against his life and that sent back in chains to the Falisci the betrayer of the king's sons. These (said they) were the Roman methods, alien alike to the slyness of the Carthaginians and the cunning of the Greeks, who deemed it a proud thing to overcome an enemy by craft rather than by force, and even if at the present day guile may seem occasionally more profitable than valor, yet you have finally conquered an enemy's courage only when you have extorted from him the acknowledgment that he has been beaten in a just and righteous war by no trickery or chance, but in a hand-to-hand measurement of strength. This, as Livy tells us, was the contention of the greybeards, but it did not prevail.

[5] We find on record, however, that the Romans of olden time sometimes found the mere reputation for downright valor and untarnished good-faith more useful than their unconquered arms. The story of Camillus furnishes a striking illustration of this; for at the siege of Falisci, which promised to be of indefinite duration, his surrender of the schoolmaster who was betraying the sons of the Faliscan nobles and his declaration that he had no wish to conquer save by Roman methods—  
 Bk. 5. valor, toil, arms—impressed all ranks of the Falisci (as Livy narrates) with such respect for Roman good-faith and for the general's justice that, by common consent, a mission was despatched to the camp of Camillus, and thence by his permission to the Senate at Rome, to surrender Falisci. And when the mission was introduced to the Senate it is recorded that its address contained the following passage: "The issue of this war bequeaths two salutary examples to the human race. You preferred to keep faith in war rather than gain a present victory; we, stirred by your good-faith, spontaneously offered you victory."

So, also, Fabricius overcame Pyrrhus with an equal display of virtue, though he could not get the better of him in arms, for he surrendered to Pyrrhus a doctor who was plotting against his life; and when Pyrrhus sent back to him some prisoners of war gratuitously, he declined to accept the gratuitous favor and himself sent back just the same number, so that there should be no appearance of payment for his good deed and because the Romans, who had not been prompted by any special favor towards Pyrrhus, wished to avoid the imputation of compassing any one's death by guile and of securing in that way a victory which they were powerless to gain in the open field. And this act of Fabricius was highly praised by the Senate, who esteemed it a great scandal and disgrace to overcome any one with whom they had an honorable contest, not by valor but by crime.

Plut. in Apophth.  
Cic., Offic., bk. 3.

The case of Saul and David is parallel: They were fighting one another and David had repeated opportunities of destroying Saul, unpremeditatedly and without any trouble, but he would not do so, vowing

that he would not stretch forth his hand against the Lord's anointed unless Saul should happen to descend into battle and perish or the Lord should smite him.

1 Sam., ch. 26.

Further, the conduct of Quintus Servilius Cæpio was much reprobated in that he made away with Viriatus by fraud and snares and domestic assassins, so that he was said to have trafficked for a victory rather than to have gained one.

Val. Max., bk. 9,  
ch. 7. L. Florus,  
bk. 2, ch. 17.

The reputation of Fabius Maximus as a consummate general rests, moreover, not on any employment of deceit, but on his skill in concealing his plans and in lying quiet and dissimulating and laying ambushes and anticipating the plans of the enemy.

Cic., *Offic.*, bk. 1.

## CHAPTER IX.

*Of the law of ambassadors.*

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| <ol style="list-style-type: none"> <li>1. Ambassadors inviolable.</li> <li>2. Usual to surrender to the enemy one who assaults an ambassador of the enemy.</li> <li>3. Ambassadors can not go beyond the scope of their embassy.</li> <li>4. The law of ambassadors only obtains in the case of "enemies."</li> </ol> | <ol style="list-style-type: none"> <li>5. A rebel is not inviolable even if employed on the business of an embassy.</li> <li>6. The despatch of an embassy to rebels is unbecoming the king's majesty.</li> <li>7. Wisdom and dignity to be displayed by ambassadors.</li> <li>8. Embassies sometimes intrusted to women.</li> </ol> |
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[1] Ambassadors were safe and inviolable among all peoples. This was provided by the law of nations. The word *sancti* was used of them by the Romans, it being derived from the tufts of herbs (*sagmina*) which the ambassadors of the Roman people used to carry—just as the ambassadors of the Greeks used to carry what were called *κηρύκεια* (wands), as Marcian tells us.

[2] Any one, therefore, who had assaulted or injuriously treated an ambassador of the enemy was ordinarily surrendered to the enemy, a proceeding which, as we have said, was secured by fecial law. Thus, in the consulship of Marcus Æmilius Lepidus and Caius Flaminius, for laying violent hands on the ambassadors of the Carthaginians, Lucius Minucius Myrtilus and Lucius Manlius were surrendered by the feccials to the ambassadors at the bidding of Marcus Claudius, the urban prefect, and were carried off to Carthage. And Quintus Fabius and Cnæus Apronius, ex-ædiles, for assaulting the ambassadors who had been sent to Rome by the city of Apollonia, in the course of a dispute which had broken out, were forthwith surrendered by the feccials. And, indeed, if those who had violated the ambassadors had not been surrendered, or if the violent act had been planned by the State, custom would have justified a declaration of war.

The Romans, accordingly, made ruthless war on the people of Fidenæ for slaying the Roman ambassadors at the bidding of Tolumnius, King of Veii, to whom they had defected; and also on the people of Illyria in return for the beheading of the Roman ambassadors. David, too, made war on the King of the Ammonites in return for the outrage upon his ambassadors. For an outrage offered to ambassadors is deemed offered to the king or State whose embassy they are carrying out. Nay, although, on a sudden outbreak of war, those who are found among either people may be enslaved by their enemies, even when they came in time of peace, yet (so Pomponius ruled) ambassadors continue

free, and this agrees with the law of nations. And, of a truth, these concessions to ambassadors are made with the utmost reasonableness, in order that representatives of each side may be in a position to treat with safety about the terms of a peace or a treaty or a truce. They frequently lay very big controversies to rest by means of a little labor.

And so the Romans attached to the law of ambassadors an exceptional degree of inviolability over and above that which they attached to the laws of war and peace. This was carried to such a pitch that Scipio Africanus let go unharmed a vessel loaded with many illustrious Carthaginians, which had fallen into his power, because these persons declared that they were ambassadors sent to himself—and this although it was clear that they had falsely assumed the style of an embassy in order to escape a danger. Scipio, however, preferred it to be adjudged that the good faith of a Roman general had been abused rather than that it had been invoked in vain.

Val. Max., bk. 6.  
ch. 6.

A similar thing happened after the expulsion of Tarquin from the throne. His ambassadors had come to Rome to claim some property of which he had been despoiled and entered into secret negotiations with some young nobles with a view to the restoration of the king; the thing was detected. Although their conduct was such as to rank them with enemies, yet (in Livy's words) the law of nations prevailed. A similar thing happened when the Volscians despatched certain spies in the guise of ambassadors to the Roman camp, in order to spy out their number and warlike equipment. Convicted and confessedly guilty as they were, yet the dictator Postumius saved them harmless from the mob that had been roused up to attack them. He made this concession to the mere empty name of embassy, lest perchance the enemy should be furnished with some honorable pretext for war by feigning that violence had been offered to their ambassadors in breach of the law of nations.

Dien. Halic., Rom.  
antiq., bk. 6.

[3] I do not, however, think that this case provides complete legal safety for ambassadors who comport themselves similarly, seeing that ambassadors may do nothing outside the scope of their embassy. Accordingly, the conduct of the Gauls, on the occasion of their attack on Clusium, was correct. The Fabii, who had been despatched as Rome's ambassadors to require the Gauls not to molest her allies of Clusium, took up arms, after the termination of their mission, and, in defiance of the law of nations, actively joined the battle-array of Clusium. When the Gauls saw this, they sent an embassy to Rome to complain of the outrage and to demand the surrender of the Fabii on the ground of their violation of the law of nations; but so far were they from obtaining it that they heard that the very men whose punishment was being mooted had been appointed military tribunes for the following year. Burning with anger at the honor wantonly done to the violators of human law and at the indignity offered to their embassy, the Gauls passed by

Ac-Dig. 50, 7, 9, 2.

Clusium and made straight for Rome and, after defeating the Romans  
 Bk. 5. on the Allia, took the City and sacked it. And this calamity, Livy tells  
 us, overtook the Romans because of the violation of the law of nations.

[4] It must be further noted that this law of ambassadors, like  
 the other laws of war, holds only in the case of enemies (*hostes*) and  
 not in the case of robbers and rebels and others not covered by the term  
 "enemies" (*hostes*). This has been already mentioned. And so

Dig. 49, 15, 24; and 50, 16, 118. Philipp. 8. Chs. 2 and 6.

Cicero remonstrated against the concession made to the envoy of Antony, to whom access to the City gates ought not to have been allowed, and maintained that his return to Antony ought to be prevented. And the Emperor Theodosius, too, was within his right in throwing into prison the envoy of a certain tyrant who had risen against him. So also the Emperor Charles V, when he threw into prison the envoys of the Duke of Milan, one of his vassals, who was plotting war against him.

Acc. to Bodin, Republic, bk. 1, ch. 6.

[5] Nor will citizens and subjects, who with wicked intent and traitorous design are among the enemy and whom Paulus would class as enemies (*hostes*), receive any protection from the law of nations, not even if they are clothed with the functions of ambassadors; for although they may be classed as enemies, yet the same law does not apply to them as to enemies, as we have elsewhere shown; for they are rebels and unjust

Above, on just war and on keeping faith with an enemy.

(*injusti*) enemies and they can not by any means whatever free themselves from the jurisdiction and power of their sovereign, which bind his subjects all the world over—any more than the slave Barbarius Philippus, who had been appointed prætor at Rome, succeeded in buying his freedom when he was claimed as slave by his master who had followed him up (as Bodin tells us, following Suidas). And the same principle justified the imperial officials in killing Rangonus and Fregosa, vassals of the Emperor Charles V and ambassadors of the King of France to the Turk, although this was done without the Emperor's orders.

Dig. 50, 9, 6. Cod. 4, 63, 4. And c. 2, bk. 1, 2 in vi.

Bk. 1, ch. 6.

[6] Now it is utterly unfitting the majesty of a sovereign to send ambassadors to rebels and it was on this ground that Cicero resisted as strenuously as he could the despatch of ambassadors to Antony when he was making war on the Republic; maintaining that, since a citizen and not an enemy was concerned, the situation called for armed coercion and not for verbal demands. Indeed, God himself so abominated rebels and schismatics that when the man of God was sent to Jeroboam (to whom

Philipp. 5. And see above, chs. 2 and 6.

the ten tribes of Israel, abandoning their king, had revolted) to denounce his iniquities, he was forbidden to eat bread with them or drink water, and when he gave not heed, but fed in defiance of the Lord's command, he was visited with the divine vengeance and killed by a lion on his way back. And not only is it unworthy of a sovereign's majesty to send an embassy to rebel subjects, but also extremely hazardous, for it is not to be looked for that the law of nations should be respected by those who are contemning divine and human law.

1 Kings, ch. 13, and c. 9, C. 7, qu. 1.

Dig. 1, 14, 2.

[7] Further, prudence and dignity are prime requisites in an ambassador. For when the Carthaginians sent ambassadors to Rome about peace they failed to obtain it, because the ambassadors who were sent were young and of no dignity and declared themselves unable, by reason of their youth, to remember the contents of previous treaties; and on this ground they were also had in suspicion and the selection of them to demand the ancient peace, which they did not themselves remember, was put down to Punic trickery; but later, when the fortunes of the Carthaginians were at the lowest ebb, they sent Hanno the Great and Hasdrubal Hedus and others of respectable age and dignity to beg for peace at Rome, and then only did the Romans admit that the Carthaginians were really and sincerely treating for peace, and for that reason they granted it.

Livy, bk. 30.  
Appian, Punic war.

Well known, too, is that utterance of Cato about the ambassadors of the Romans who were sent to arrange peace between Nicomedes and Prusias. One of these ambassadors carried disfiguring scars caused by a rock which had in earlier life struck him on the head, and a second limped, and the third was reckoned simple-minded to the verge of foolishness; so that Cato made mock of that embassy and said that it had neither mind nor feet nor head.

Appian, Mithridatic war.

Gravity also is at times of much advantage in an ambassador and sternness for the sake of the State. An example was shown by Caius Popilius: Antiochus tendered his right hand to him on his arrival, but he delivered to him the tablets which contained the decree of the Senate charging the King to desist from the war with which he was harassing Pompey; and then, when Antiochus, after perusing these, said that he would take counsel with his friends as to the course he should adopt, Popilius, with the usual asperity of his disposition, drew a circle round the King with a rod which he held in his hand and demanded, "Before you leave this spot give me an answer to take back to the Senate." The King, taken aback by such an overbearing command, replied, after a short hesitation, "I will do as the Senate requires": and only then did Popilius proffer to the King his right hand, as to an ally and friend.

Livy, bk. 45.  
Val. Max., bk. 6,  
ch. 4.

[8] Sometimes, indeed, embassages have been intrusted to women with the greatest profit and utility to the State. Accordingly during the Sabine war, in the reign of Romulus, a decree of the Senate was made whereby the opportunity was given to those Sabine women who had children at Rome, to go on a legation to the Sabines, leaving their children with their husbands. The head of this embassy was Hersilia, and she arranged peace between Romulus and Tatius, the Sabine king; for this the women received great honors from the kings.

Dion. Halic., Rom. antiq., bk. 2.

Again, when Marcius Coriolanus, who had been unjustly punished with exile, in order to avenge his wrongs, approached to the very walls of the city, after the defeat and slaughter of several armies of the Romans, and neither the envoys who had been sent to intercede with him

nor the priests with their sacred fillets could aught avail, his mother Veturia, taking with her his wife Volumnia and his children, won her son over and disarmed him by her entreaties and tears, and so (in the words of Livy) a city which its men could not defend by arms was defended by the entreaties and tears of its women. The Roman people, too, compelled Mutia, the mother of Pompey, by threats to undertake an embassy to him; and, on her initiation and that of Julia his wife, a treaty was struck between Pompey, Antony, and Octavius Cæsar.

Val. Max., bk. 5,  
ch. 4. L. Florus,  
bk. 1, ch. 22.

Bk. 1.

Appian, Civil  
war, bk. 5.

And that is noteworthy which we read of the Celts, how that they join their women with them in consultations about peace or war and discuss with their help differences that have arisen between them and their allies—the explanation being that at an earlier date, when a grave and implacable discord had plunged them into civil war, their women flung themselves into the thick of the fight and settled all the disputes with an admirable adroitness and re-established concord. Accordingly, in the very treaty which they arranged with Hannibal, it was provided that if the Celts should have any matter of complaint against the Carthaginians the matter should be dealt with by the Carthaginian generals and prefects in Spain, but that if the Carthaginians should have aught against the Celts, the inquiry into the matter should be conducted before the women of the Celts. But it was wise advice that Marcus Cato gave, to the effect that public audience should not be given to the three orators of the Athenians,—Carneades, Critholaus, and Diogenes,—for he knew them to be of such availing eloquence as that they could persuade to whatever course they wished, whether right or wrong.

Plut. on Virtues  
of women.

Pet. Crint.,  
de honest.  
discipl., 22, 4.

BOOK THE SECOND

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Of the Law and Duties relating to War and of  
Military Discipline



## CHAPTER I.

### *Of the duties relating to war.*

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1. War to be undertaken only for just cause.
  2. Lust of power brings many evils with it.
  3. Resort not to be had to war, save of necessity.
  4. Sometimes victory is a cause of more loss than gain.
  5. Good fortune to be borne temperately, bad bravely.
  6. The Romans neither elated when victors, nor cast down when vanquished.
  7. Two maxims of Plato especially applicable to the duties of war.
  8. A brave man will do naught for his own ends, but everything for the commonwealth.
  9. By what means the country's interests may be served.
  10. To die for the State is honorable.
  11. Those are not blameworthy who in war subject themselves to the risk of death.
  12. For the good of the fatherland it is lawful to kill one's father or one's son.
  13. In war the defense of those is not to be undertaken who can not be adequately defended.
  14. Those things are not rashly to be given up which can withstand the enemy's attack.
  15. Excessive severity not to be wreaked on the vanquished.
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[1] It being the prime function of justice (as Cicero tells us) to prevent one man hurting another save in return for wrong done to him, it is one of the first of the obligations connected with war to abstain from making war except on just grounds, so that the law of human society may be preserved inviolate, and to repress all lust of conquest, as being not only inconsistent with justice but also fraught, ordinarily, with many other ills. offic., bk. 1.

[2] For (as Livy says) no great State can be in repose if, though having no external enemy, it finds one within itself, just as exceptionally strong frames seem safe as regards external influences, but find their very strength a source of trouble. And, as the ambassadors of Darius told Alexander, there is a hazard in over-swollen empery, it being difficult to hold in check what is beyond one's grasp. This led St. Augustine to say, "As in men's bodies it is better to have a moderate stature coupled with health than to attain a gigantic bulk involving constant illnesses and not giving you rest when you have attained it, but worrying you with more and more troubles the bigger you get, so a small peaceful dominion is better than a large and turbulent one." Quint. Curt., bk. 4.  
Kingdom of God,  
bk. 3, ch. 10.

And this seems to be what Calanus the Indian (a distinguished name in philosophical pursuits) was driving at: for he came to Alexander the Great and threw down in front of him a dry ox-hide and then walked on the edges of it, pressing them down with his feet, with the result that, when the hide was trodden on on one side only, the other sides were lifted up high; then after doing this he firmly stood upon the

middle and the whole of the hide remained at rest. By this illustration he was intimating to Alexander that he ought not to spend time on the outlying parts but ought to be looking after the heart of his empire, and that this was the way of insuring quiet to the whole of his dominions.

Life of Alexander.

The Spartans afford us an adequately instructive illustration of the same thing. They had made themselves overlords of the whole of Greece, both by land and by sea, and were so consumed by the lust of dominion that they thought to reduce all Asia under their sway, and thereby they stirred up such envy and hatred against themselves that they lost alike empire and liberty. Accordingly, it was a wise reply which Theopompus, King of the Spartans, gave to his wife: he was the first to conjoin Ephors with the kings of Sparta, and his wife upbraided him that he would leave a smaller kingdom to his sons than he had received. He replied that he would be leaving it greater, in proportion as he left it securer. And this doctrine seems to have commended itself to the warrior Hannibal, when he said to Scipio, "It would have been best if the gods had given to our forefathers the disposition to be content, you with the rule over Italy and we with the rule over Africa, for we have been so greedy of other persons' possessions that we have had to fight for our own." It holds good in all businesses, but especially (as Cicero says) in the business of war, that before an advance is made careful heed must be given to preparations and to the thinking out of future plans, and all possible happenings of either kind must be arranged for, some time beforehand, and the way of dealing with all emergencies decided on, and there must be no muddling so that at some future date one may have to say, "I did not think of it"—which Iphicrates used to insist was the most disgraceful thing that a general could say.

Plutarch, Education of a prince.

Livy, bk. 30. Offic., bk. 1.

Plutarch, Apoph.

[3] Further, just as doctors rarely and reluctantly resort to cutting and burning, so we to war, and in no case except of necessity because no other medicine can be found. Augustus furnishes an example of this, for he held all war in utter detestation and never declared war against any people except on the gravest grounds, for he was wont to say that it marked a vainglorious and petty mind to stake the security of the citizens on the uncertain issues of fighting, in order to gratify the passion for a triumph and for a laurel-wreath.

War must also not be undertaken unless the hope of profit bulks larger than the fear of loss; it will otherwise be best to remain quiet, as Archidamus warned the Eleans who were projecting a war without due consideration. For (as the same Augustus used to say) those who, in quest of small advantage, subject themselves to no small struggle are like the persons who go fishing with a golden hook, the loss of which, if it were torn off and lost, could not be compensated by the profits of any catch. It will, therefore, not be a wise proceeding to make war on the poor. Sesostris, King of Egypt, may be cited as an example of this

Plut., Lacon. Apoph.

Suetonius on August.

point. When he first made war on the Scythians he sent ambassadors beforehand to demand the submission of the enemy, and the Scythians replied with an expression of surprise that the king of so wealthy a people should be foolish enough to enter on a war with poor folk, especially when that course would cause difficulties for him at home; for the issue of battle (said they) is twofold, and the rewards of victory would be none, and the losses were manifest; and so the Scythians (said they) did not anticipate that the loss would fall on them, since the enemy had so many more objects of their desire than they had, and that they would willingly go out to meet him. This they did and drove the king off in flight.

Justin, bk. 2.

Reason in arriving at determinations is therefore more to be sought after than bravery in fighting, and it is becoming in a wise man to try every other course before resorting to arms. The Spartan custom, accordingly, may be properly praised, whereby before attacking the enemy they honored Amor with due rites; and the Spartan kings before an onslaught sacrificed to the Muses, to Clemency and Friendship, and not to Mars, deeming it preferable to conciliate the minds of the enemy by agreement and a bloodless peace than to risk the cast of battle. But where the occasion and necessity demand it, there must be hand-to-hand fighting; and an honorable war, in Demosthenes' opinion, is ever preferable to a shameful peace. With wisdom, then, did the Spartan commonwealth, in conformity with the extremely severe laws of Lycurgus, withdraw for some considerable time the eyes of its citizens from Asia, lest caught by its allurements they should lapse into a too dainty manner of life. And that this was no groundless fear is sufficiently shown by their general Pausanias, who, after great exploits, directly he indulged himself in the practices of Asia, did not blush (according to Valerius Maximus) to weaken his courage with its effeminate practices.

Bk. 2, ch. 9.

[4] It very often happens, then, that more is lost by victories of that description than is gained. To this that same Asia testifies, for when it became a Roman possession it took over to Rome, together with its wealth, its vices.

Justin, bk. 36.

[5] Now it is the part of a brave soul, such as war calls for, to bear success temperately and misfortune bravely, not to be disturbed by difficulties nor (as it is put) be flustered and lose his head, but to employ the resources of an alert mind, and not to quit the path of reason but to confront all kinds of fortune with unvarying courage. And he, in fine, will be a man whose mind (in Livy's language) is neither carried away by the breath of prosperous fortune nor bruised by adverse fortune, such a man as Camillus is depicted in his utterance, "The dictatorship did not give me my courage, nor has exile robbed me of it."

[6] And memorable Roman examples of this thing remain to us, so that it is doubtful whether the Romans were more admirable in adversity or in prosperity, it being said of them, "Defeat does not abate their

Justin, bk. 31.

courage; nor, if they conquer, does success elate them." And so in the consulship of Albinus, after the army had been cut to pieces by Pyrrhus and the defeat of Cannæ had been sustained (which was indeed of the gravest character) and when there had been three successive defeats by Hannibal, there was not displayed at Rome even the slightest indication of despair nor any talk of peace, but rather was there a high-souled consideration how to repair the fortunes of war. And it was decided not to ransom eight thousand prisoners who by surrender and without striking a blow had fallen into the hands of Hannibal, though they could have been ransomed at a low figure; but eight thousand stronger young men were bought out of slavery and invested with arms at the public expense.

Bk. 22. This soldiery was preferred (says Livy) although there was the opportunity of ransoming the prisoners at a lower figure.

The same thing happened after the Romans had been defeated in a cavalry engagement by Perseus, King of Macedonia. Perseus yielded to the advice of friends who urged that favoring fortune should, for choice, be employed in furthering an honorable peace, and that he should not be carried away by empty hope and so land himself in irreparable disaster; he accordingly sent envoys to Publius Licinius, the consul, to sue for peace on the same terms as had been granted to Philip. During the de-

Bk. 42. liberations spectators were excluded and (in Livy's words) the Roman firmness of design prevailed and it was decided to return the answer that peace would be granted provided that the King would allow to the Senate the power to issue decrees in all matters of high politics touching himself and the whole of Macedonia. The conquered laid down for their conquerors conditions such as are usually imposed on the conquered. For such was then their habit—in reverses to adopt the bearing of success and in successes to curb their spirits.

Like to this was the conduct of Marcellus. His army had been defeated and put to flight the previous day; so the following day, after severely rebuking his troops, he advanced in battle array; and, when Hannibal received the news of this, he exclaimed, "I have, for sure, to deal with an enemy who can not bear either good or bad fortune; either he wins and then he fiercely follows up the beaten or he loses and then he renews the contest with his conquerors." Marcellus indeed gained a

Livy, bk. 27. great victory, and so when Pyrrhus saw that though he had overthrown a number of Roman armies the survivors made haste to form a new army, he said, "I see clearly that I was born under the constellation Hercules, who found the lopped-off heads of his enemies springing up again from their own blood in just the same numbers, as if from the Lernæan serpent."

Florus, Rom. Hist., bk. 1, ch 18.

And indeed this high-souled firmness of the Romans was of such avail that it constrained Pyrrhus to be the first to sue for peace, although he was the victor and although his army had received large reinforce-

ments; and though he claimed that the terms of the peace should be on the footing of equality, yet, on the proposal of Appius Claudius Cæcus, it was decided to tell the King in reply that he must quit Italy and that then if it suited him he might make proposals for friendship and alliance; but that, so long as he continued under arms, the Roman people would fight against him even if he had got the better of a thousand Albinuses in battle.

Plut., Pyrrhus.

Indeed, just as we have shown by previous examples that it was a difficult thing to vary the Roman custom of refusing to be upset by reverses, so let their rule of not being elated by success be illustrated by the reply which Scipio Africanus made to Antiochus when the latter, after his defeat, was suing for peace:

“We Romans [said he] have ever borne (and ever will) the same heart and courage in all fortunes. Neither has prosperity lifted it aloft nor adversity put it down. For proof hereof I might produce your friend Hannibal as witness, to say nothing of others, but that I can address me to your own selves. For after we had passed over Hellespont, even before we saw the King’s camp and army, when the hazard of war was indifferent, when the issue doubtful and uncertain, look what conditions we then offered upon your treaty for peace, while we were equal one to the other; well, those same and no other we present to you now that we are conquerors and you are conquered.”

Livy, bk. 37.

Of a truth this equability of temper and this moderation are not only worthy of a great man (for, as Varro writes, the wise man ought alike to bear prosperity temperately and misfortune bravely and mildly), but they are also frequently and commonly found to be of the highest importance in the conduct of affairs, for it usually is the case that prosperity begets negligence. It was on this that Lucius Marcius relied after the death of the Scipios; for with the remains of their armies, after an address to the troops, he attacked the two camps of the Carthaginians in Spain on the same night, finding everything there in neglect and disorder, and he took them and slaughtered the enemy. Amyntas, too, proving superior in battle, drove the Egyptians to Memphis and besieged this place and led his troops out to lay waste the country; but the enemy seeing that their conquerors were dispersed and reckless, in reliance on their victory, attacked them, and Amyntas with all his men was put to the sword.

Livy, bk. 35.

Quint. Curt., bk. 4.

It was accordingly a wise remark of Quintus Fabius Maximus that he was more apprehensive of some evil arising from the success of his colleague Minucius than from any untoward event; and his judgment was not at fault, for his colleague, elated with success, joined battle with the enemy and placed himself and his army in unmistakable peril, but was rescued by Fabius. So also when that rash man the consul Terentius Varro, in the course of operations against pillagers, had come off best in a certain

Livy, bk. 22.

irregular encounter, Hannibal without any difficulty put up with that loss, nay he preferred to believe it the (as it were) insatiate rashness of an impetuous consul and a raw soldiery; and so indeed it turned out to be, for by their foolish rashness (against which Varro's colleague, Lucius Æmilius Paulus, strove in vain) that disastrous defeat at Cannæ befell the Romans; and the self-same Varro, who was just as humble after his experience of defeat as he had been impetuous before it, indisputably alienated the minds of the Campanians from the Romans by the way he disclosed the defeat. A brave man ought therefore to use every endeavor not only not to be broken by failures, but also not to be puffed by successes—and all the more so because we can ordinarily bear bad fortune better than good fortune.

Livy, bk. 22, end,  
and bk. 23, begin.

Accordingly, the day after Epaminondas gained the victory of Leuctra he went forth in neglected and lowly fashion (though he was, on other occasions, wont to be seen with anointed body and beaming countenance), saying that on the previous day he had been too elated in mind and that he was chastising that excessive joy. And when Philip overthrew the Athenians, with whom certain Greek cities had joined themselves, in a great battle, it was wise of him so to conquer as that no one felt the victory, and he so restrained himself between his own silent joy and the enemy's grief that he was not deemed by his own men to be rejoicing nor by the enemy to be overbearing; yet that victory gave Philip the overlordship of the whole of Greece.

Plut. Apoph.

Justin, bk. 9.

[7] Further, there are two well-known precepts laid down by Plato for the guidance of statesmen, which are peculiarly applicable to the obligations connected with war. One is, so to watch over the interests of the citizens as that the statesman's every action should be referred to that object, regardless of his own private advantage; the other is to take care of the whole of the body politic, not paying regard to some one part and neglecting the rest; for the curatorship of the State, just like private guardianship, is to be conducted in the interests of the parties whose business has been put in trust and not in the interests of the trustee.

Cic., Offic., bk. 1.

[8] A brave man, then, will take heed (as Cicero says) that he does not campaign and expose himself to dangers more for his own advantage than for that of the community, for the greatness of soul which manifests itself in dangers and toils is in fault if it lacks justice and fights not solely for the common advantage but for private gain—if indeed the Stoics be right in declaring that bravery is a virtue when fighting on behalf of right, and that nothing can be honorable which lacks justice.

That quality of mind, therefore, which is ready to encounter dangers (the afore-mentioned Cicero tells us) must be labeled audacity rather than bravery, if it be driven into dangers by its own greed and not for the public weal. Accordingly Callicratides, the Lacedæmonian general, was deservedly blamed for preferring the loss of his fleet to that

of his private renown; and so, too, Cleombrotus, who through fear of detraction joined battle rashly with Epaminondas. How much more correct was Quintus Fabius Maximus, who preferred that his own power should be lessened by the empty populace rather than win fame by mismanagement. And the man in question urged Lucius Æmilius Paulus, when the latter was starting for the war against Hannibal, with the rash Terentius Varro as his colleague, to conduct the war against Hannibal by sitting still and not rashly to engage with the enemy; and he made him the following address:

“ Resist them you shall well enough if you will stand firm and hold your own against all bruits and speeches of the people; if neither the vainglory of your colleague, nor the rumors that shall be falsely blown abroad to your disgrace, shall once stir you. Old saws these be: That truth may too often be sick, but it shall not die: He that will despise vain-glory, shall attain in the end to true glory. Let them call you fearful for careful, slow for considerate, an ill soldier and ignorant for a skilful warrior and experienced. If you adventure all things boldly, Hannibal will contemn you; enterprise nothing rashly, and he shall dread you.” Livy, bk. 22.

There is extant also the celebrated speech of the eminent Lentulus to the same effect, made on the occasion when the Romans had been surrounded at the Caudine Forks and an embassy had been received from the Samnites saying that there would be no other conditions of peace than that the Romans should pass under the yoke, unarmed and with one garment apiece. These were his words:

“ I have heard my father, O ye consuls, oftentimes make report that he was the only man in the Capitol who persuaded the Senate not to ransom the City from the hands of the Gauls with gold, seeing that they were not inclosed either with trench or rampart by their enemies (who were most idle in such works and in making fortifications), but might break through them, if not without great danger yet without assured destruction. Were the case so now, that just as they then, being armed, might have run down out of the Capitol upon their enemies (in which sort oftentimes the besieged have sallied out upon them that lay in siege), so we might but fight with our enemies in any place (it skilleth not), good or bad, even or uneven, I would not in giving counsel be any jot behind my father in courage and valor. For I confess, verily, that to die for our country is a brave death; and for my own part ready am I even to offer my body as a sacrifice to present death, and engage myself among the thickest of my enemies, thereby to save the people of Rome and the legions. But, alas, here I see my country, here I see all the Roman legions that there are, who, unless for their own selves they will run upon their death, what have they else to save by their death? Why, some man will say, the houses and buildings of the city, the walls, and that multitude that inhabit the city. Nay, rather, if this army fortune

here to miscarry, they are all clean betrayed into the enemy's hands and not saved. For who shall defend them? Peradventure the weak and unarmed multitude: even as well surely as they defended it against the violence of the Gauls! Or will they send for an army from Veii and beseech again the help of Captain Camillus? Nay, here in this place is our whole hope and puissance; in saving it we save our country; in offering it to death, we abandon and betray our country. To yield ourselves is a foul and shameful thing; but such is the love of our country that we ought to preserve it as well with our utter shame, if need require, as by our death. Let us undergo then and abide this shameful indignity whatsoever, and obey that necessity which the very gods themselves can not

Livy, bk. 9. overcome."

[9] We are bound, then, to take all measures which will serve the interests of our fatherland and State, and we ought to shrink from no disgrace in its defense, not even from death itself if circumstances demand it, but (in Plato's words) if your fatherland requires that you should give yourself up to be flogged or to be imprisoned, or if it sends you to battle where wounds may be received and death encountered, you must render absolute obedience; there must be neither shuffling nor flight; but alike in war and in court and (in a word) everywhere the mandates of your State or fatherland must be executed; for in all our actions we ought to have regard not to our own advantage and interests, but to the well-being of our country.

Cic., against  
Vatinius.

[10] Indeed, death for one's fatherland has ever been reckoned a most glorious thing; and so Cicero exclaims: "O death, happy above all others, when the debt of nature is paid for one's fatherland!" On the other hand it is a most shameful thing, when the occasion offers a valorous and honorable death on behalf of one's country, to prefer life at the cost of disgrace and cowardice.

Dig. 27, 1, 18.

Philipp. 14.

Cic., to Herenn.,  
bk. 4.

e. 9, C. 23, qu. 8,  
and c. 46, C. 23, qu.  
5, and Span. Ordin.,  
bk. 3, tit., 25, par. 2.

Those, in truth, who die on behalf of the Church obtain a heavenly kingdom, and that is the meaning of Cicero's utterance: "They, then, whom you have slain will expiate even in the world below the penalty of parricide, but you who have so gloriously yielded up your last breath have obtained the seats and habitation of the blest." And indeed the soldiers of the Cimbric of ancient times held death on behalf of their country so glorious that they did not deem themselves blessed unless they died fighting, on the ground that they had not otherwise been steadfast to the end of their life; they would, accordingly, leap for joy when in the battle-line, as if about to quit life in a glorious and blessed way, while they would mourn, when stricken with disease, at the approach of a disgraceful and miserable end.

Philipp. 14.

Val. Max., bk. 2,  
ch. 6.

[11] It follows that those generals and soldiers who, in the struggle for victory, expose themselves to extremity of danger in battle and encounter, wherein death is more probable than escape, are not to be

forthwith convicted of mortal sin, for (in the words of St. Augustine) : Bk. 3 against Faust. Manich. And c. 4, C. 23, qu. 1.  
 "No blame attaches when in battle those die who must die at some time or other: it would be the timid rather than the religious who would find anything to blame there, for although no man may effect his own death (so to do being mortal sin), yet it is allowable to expose oneself to death or to extremity of peril for a just cause, as on behalf of one's country or the Catholic Church." c. non licet, [C. 23, qu. 2 (?)].  
 Ambrose, accordingly, defends the brave Eleazar from a charge of sin and covers him with praise, in that he slew an elephant which towered above the rest and wore royal trappings, because he thought the king was on it, and was himself crushed to death by the beast in its fall. Aug., Kingdom of God, bk. 1, chs. 20 and 21.

De offic., bk. 1, ch. 20

Maccab., bk. 1, ch. 8.

[12] Nay, if (in the interests of his country's well-being) one were to kill his father or his son, he would not only be guiltless but even worthy of reward. And this holds good, I think, if the destruction of his country be really in question and the son can, neither by advice nor by threats, avail at all to divert his father from his design; for there is abundant authority among the philosophers for preferring the well-being of one's fatherland to the well-being of one's father, and the law too takes the same view, whatever Bodin may say to the contrary and in rash rebuke of the expounders of the law. Dig. 11, 7, 35.  
 When Fulvius, the son of a senator, was setting out to join Catiline, his father had him called back and put to death. This was a noble act. He, indeed, who betrays his country is guilty of high treason. Cic., Offic., bk. 3.

Republic, bk. 1, ch. 4.

Sallust, Catiline. Dig. 48, 4: 1 and 2.

[13] Further, as regards that second precept of Plato, great diligence must be employed lest when we are proposing to safeguard individual parts of the State we subject the body as a whole to danger. Accordingly the defense of allied cities and other places which are not easy of defense ought not to be lightly undertaken in war. It is better to leave them exposed to the enemy than by a futile defense of them to endanger the main concerns; or even to bring them into reputed danger, for often what is noised about over widely and made more serious than is actually the case, is of first-class importance to the whole issue of the war.

And so the saying goes that rumor takes part in war and that trifles drive the minds of men towards hope and towards fear. That is why Philip, King of Macedon, after sustaining defeat in war at the hands of the Romans, turned and laid waste the allied cities and other places which he had no means of defending, and summoned all the men who were capable of following him, giving permission to owners to take with them such of their goods as they could, the rest being the booty of the soldiery. To do this was a bitter thing for Philip, but he wanted to take away at any rate all movables from land which was soon to pass to the enemy. Livy, bk. 32.  
 And in doing it he seems to have copied the example of the Suevi who, when war was made on them, used to hold a council and then send messengers in all directions ordering the inhabitants to quit the towns and

On Dig. 1, 1, 2 and Cod. 2, 7, 14. Bonaud in his suppl. to Terrarubea, tract. 3, art. 3. To the same effect what Clarus gives in § feudum, qu. 21, nu. 3.

take their children and wives and all their goods into the forests, and bidding all who were capable of bearing arms to assemble at some one

spot.  
Caes., Gallic war, bk. 4.

On the same principle, when Vercingetorix was planning a revolution and attempting to seduce the Gauls from their loyalty to the Romans, he induced the Bituriges to burn their towns which were not free from danger, having regard to their state of defense and the nature of their position, lest they should yield cover to such of their men as wished to shirk military service or should be open to the Romans for the purpose of forage and pillage.

Caes., Gallic war, bk. 7.

Absolute precautions must, however, be taken that none of these measures opens the way to cruelty or greed; for when Hannibal on the one hand could not hold with his garrisons all the peoples of Italy who had joined him—at any rate without splitting up his forces into a number of small detachments (a thing highly inexpedient at that juncture)—and on the other hand could not, by the withdrawal of his garrisons, leave the allies who had trusted him void of hope and a prey to fear, he plunged headlong into greed and cruelty and yielded to the sacking of the places which he could not protect. But (says Livy) the issue showed

Bk. 26.

how foul that plan was, for not only did he thus alienate the minds of those who suffered these indignities, but the minds of other men too; indeed the example affected a wider circle than the calamity itself. Better advised were the Romans after they had sustained the defeat of Cannæ; they carefully scrutinized all the resources of their dominion and when their distant allies implored a garrison they did not send one, not having sufficient strength, but bade them shift for themselves and abstained from all cruel measures against them.

Livy, bk. 23.

Adroit, indeed, was the conduct of the consul Marcus Porcius Cato, when waging war in Spain, on the occasion when ambassadors came to him from Bilistages, the chieftain of the Ibergetes, to complain that their strongholds were besieged and that they were without hope of resistance except in the protection of Roman soldiery. The consul was harassed by a twofold anxiety: he did not want to desert his allies and he did not want to diminish his army, inasmuch as this would entail either his delaying battle or incurring greater risk in battle. He decided not to lessen his army for fear that the enemy should inflict some disgrace on him meanwhile, and determined that his allies must be fobbed off with a hope rather than with anything actual, for fictions posing as facts have often been of the greatest service in war and one who believes he has obtained assistance is in much the same position as one who has actually obtained it, for he finds safety in that very trust and in hoping and daring. Accordingly, Cato made answer to the envoys that, though he hesitated to lessen his own forces by lending them to others, yet he was mindful of them and of their crisis and danger more than of himself; so he had a

proclamation made to a third part of the men of every cohort, bidding them quickly cook the food which they were putting on shipboard, and ordered the ships to be got ready by the third day thereafter. The envoys did not leave before they had seen the soldiers embarked; and, noising it abroad as a matter now beyond all doubt, they filled not only their own men but the enemy also with the news of the approach of Roman help. But the consul, now that he had made enough show to satisfy appearances, had the soldiers recalled from the ships. By this means he put heart into his allies to sustain a siege by the hope of help and deterred the enemy from carrying on the siege, yet himself made for the enemy with unimpaired strength and gained a glorious victory.

Livy, bk. 34.

[14] Further, just as the defense of those parts which you can not protect ought not to be rashly undertaken, so also those parts ought not to be deserted which can sustain and shatter an attack of the enemy. In this respect Antiochus made a disgraceful blunder. He had been beaten by the Romans in a naval engagement; and, because he had been driven from the possession of the sea, he distrusted his capability to guard the outlying parts and so (by what later events showed to be a cowardly plan) he ordered the garrison to be withdrawn from Lysimachia lest he should be overwhelmed at that spot by the Romans. Now he might not only have easily protected Lysimachia from the first onslaught of the Romans, but also have sustained a siege during the whole of the winter and, by thus prolonging the time, have reduced the besiegers to the extremity of want.

Livy, bk. 37.  
Appian, Syrian war.

[15] Lastly, among the other obligations connected with war, Cicero includes this: not to be excessively severe to the conquered, seeing that there is nothing more praiseworthy, nothing worthier of a great and eminent man, than readiness to be appeased and clemency and

Parcere devictis et debellare superbos.

(To spare the conquered and break the proud.)

The multitude, accordingly, should be spared, and those fugitives who throw themselves on the good faith of a general ought to be received (even, as Cicero says, when a battering-ram has knocked down the wall) and only the leaders of the crowd should be punished, for (as our author says, *ad Herennium*): "It is a brave man's part to reckon those as enemies (*hostes*) who are striving for victory and to judge as men those who are conquered, so that bravery may lessen the evils of war, and humaneness add to the blessings of peace."

Bk. 4.

Now in the matter of the destruction and plunder of cities, Cicero strongly urges that good heed be given not to do anything rashly or cruelly. In this respect Marcus Marcellus won for himself the highest praise. He issued a proclamation in a general assembly giving the wealthy city of Syracuse to the soldiers as booty, but, before doing so,

he wept and he provided in his proclamation that no one should injure a free person.

Acc. to St. Aug.,  
Kingdom of God,  
bk. 1, ch. 6.

Scipio, too, after the capture of Carthage, which was filled with statues and votive offerings in the Greek style, brought from Sicily, proclaimed that people might come from each of the quarters of the city to identify and carry away their own property, and he did not allow any of his own men, whether free or slave, to accept anything by way of booty or even to buy anything, while the others were busy with the work of destruction.

Plut. Apoph.

Caius Cæsar, too, used to say that nothing afforded him greater pleasure than to spare the multitude, and he wrote to Trebonius, his legate, who was besieging Marseilles, expressly charging him not to allow the city to be carried by assault, lest the soldiery should get over-excited and, by reason of their hatred of defection and their disregard of himself and their protracted toils, should put all the young people to death, as they were threatening to do.

Caesar, Civil  
war, bk. 2.

Clemency, accordingly, is not only worthy of a great man, but it is in many cases found to be both serviceable and glorious. This is the meaning of the answer made by Philip, the father of Alexander the Great, to those who were urging him to order the adoption of stern measures against the Athenians. He said that their opinion was absurd, in that they would have a man who was displaying so many acts and

Plut. Apoph.

endurances, and with so much glory, overthrow the theater of his glory. So, too, after the Spartans had compelled the Athenians to surrender, there were some who urged that so hostile a city ought to be destroyed and its very name with it; but the Spartans said that they would not allow one of the two eyes of Greece to be plucked out. And Livy writes that the kings of Macedonia, who were wont to fight to the bitter end in battle, would spare towns, as far as they were able, with a view to possessing a more opulent dominion; for where is the wisdom of destroying the very things the possession of which is being fought for, so that nothing is left to oneself but the war? Accordingly, we read in Dionysius of

Paul Oros.,  
bk. 2, ch. 17.  
Bk. 31.

Rom. antiq., bk. 2.

Livy, bk. 1.

Halicarnassus that the third ordinance of Romulus was this: Not utterly to destroy towns that were taken in war; nay, Livy writes it down as a characteristic of war that the vanquished are enabled, by satisfactory terms of peace, to get the better of the victors and control them.

It does not seem out of place to append here the wise advice of Belisarius, whereby he dissuaded Totila from the overthrow of Rome. When Totila had entered Rome as victor he had determined to level it entirely with the ground. Belisarius wrote to him urging him to do nothing rashly: "For [said he] one of two things will inevitably happen, either you will be beaten in this war and give in, or you will win by the aid of propitious fortune; now if you come out victor and have destroyed Rome you will have ruined, not some one else's property but

your own; whereas, if you shall have preserved it, you will beyond doubt have preserved the finest and richest royal residence in the world. Should you, however, be beaten by us, you will have the right to expect undying gratitude from your conqueror for preserving the city unharmed; whereas if it be destroyed he will proceed against you without any leniency." Under the influence of this letter Totila abstained from the destruction of the city.

By a similar dilemma certain eminent men of this Academy of Louvain softened the enraged heart of the Prince of Orange, for when in that wicked expedition against his fatherland A. D. 1572 he was besieging the city of Louvain, which had no garrison, and the wisest citizens saw that they could not withstand the force of the enemy, they elected—despite the baseness of coming to terms with a wicked and unjust foe and in order to avoid the sight of the violation of all things human and divine, the profanation of temples, and the destruction of by far the most renowned Academy by utterly abandoned enemies—to yield to necessity and to buy off all these evils by the payment of a fixed sum of money rather than risk the cruelty of the enemy. And when the Prince was not satisfied with the amount of the ransom he went so far in his shamelessness as even to require from the citizens of Louvain an oath which they could not take without committing treason, and these same men, who would rather have died than bind themselves by so great a crime, checked the shamelessness of their enemy in the following way: they said,

"Either you will gain this battle which awaits you with the royal army (under the Duke of Alva) or you will be beaten. If you win, there can of course be no dealings between you and us, for we, willy-nilly, shall be in your power; but if you are beaten (the fortune of war being so doubtful) there is no reason why you should wish to incur our wrath and the King's and the Duke of Alva's."

And in this way, without treason to the king's majesty and by means of a necessary but not disgraceful agreement, they secured the interests of their commonwealth with consummate wisdom.

This commendation of humaneness and clemency is, however, subject to the limitation that severity must be employed on behalf of the State, especially when this is entirely necessary for the State. That is why the Romans utterly wiped out Numantia and Carthage, although the Pontifex Maximus, Scipio Nasica, was opposed to the destruction of Carthage, the rival of the Roman empire, and, when Cato clamored for its destruction, he maintained the contrary, through apprehension that security was the enemy of weak souls and because he saw how needful it was that fear should act as a fitting guardian to the (so to say) infant citizens. And his opinion was not at fault, for the Roman State began from that time to waste through ease and luxury.

Acc. to Pet. Crinit.,  
de honesta discipl.,  
bk. 6. following  
Procopius.

Kingdom of God,  
bk. 1, ch. 9.  
Appian, Punic war.

1 Sam., ch. 12.  
Judith, chs. 2, 3  
and 4.

Plut. Apoph.

On this point St. Augustine has some fine remarks. And Samuel, too, made it abundantly manifest to the people that God had stirred up enemies against the Israelites in order to keep them in the path of duty. For men have a way, when they have more strength than is wanted for external wars, of using it up in conflicts with one another, and this kind of war is far the most deadly. The Spartans, therefore, did well in refusing their permission, when one of their kings promised to destroy a city which had given them a deal of trouble: "Do not (said they) destroy the whetstone of valor."

Further, it is provided by law that in time of war, when the interests of the State demand it, houses (whether belonging to enemies or to citizens) which are built up to the walls, and from which there is a risk of fire or of ambush, may be overthrown and destroyed, even without the payment of compensation.

Cod. 8, 10, 9; and  
8, 11, 14.

## CHAPTER II.

*Of the commander or general of an army.*

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| <ol style="list-style-type: none"> <li>1. Nothing more uncommon than a perfect general.</li> <li>2. To whom the name '<i>imperator</i>' is applied.</li> <li>3. Better to have a good general than good soldiers.</li> <li>4. The best age for a general.</li> <li>5. <i>Leges annales</i> of the Romans (laws as to the age-qualification for public office).</li> <li>6. Four requisites of a general.</li> <li>7. The virtues of a general.</li> <li>8. A general does not rashly engage with the enemy.</li> <li>9. Better to excel in intellect than in sword play.</li> <li>10. A cautious commander to be preferred to a bold one.</li> <li>11. The enemy to be prevented from victualing.</li> <li>12. Not easy to arrest undertakings once begun.</li> </ol> | <ol style="list-style-type: none"> <li>13. The firmness and confidence of a general in war.</li> <li>14. Before an engagement the spirits of the soldiery to be maintained in divers ways.</li> <li>15. The misfortunes of the army to be concealed.</li> <li>16. The best general he who knows most about the enemy's affairs.</li> <li>17. Credence not to be rashly given to deserters.</li> <li>18. The general should constitute himself leader in all difficult exploits.</li> <li>19. The general ought to proceed cautiously in difficulties.</li> <li>20. The advice of Antigonus.</li> <li>21. Not only valor in war but other virtues, too, required in a general.</li> <li>22. A general must be allowed a free hand.</li> <li>23. The Carthaginians severe upon their generals in war.</li> </ol> |
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[1, 2] If a war has to be waged the thing of first importance is to decide whom we shall appoint to command the army, for it is a true old saying that an army is worth just as much as its general is, and there is nothing harder to be found than the perfect general. Now this designation "*imperator*" used to be of common application to those who were appointed to command an army for a given period, but subsequently Cæsar adopted it as a standing title after he had acquired the supreme headship of the State and herein he was followed by others.

[3] For the reason given above, Philip of Macedon used to say that he wondered at the Athenians' appointing new generals every year, seeing that in the whole course of his life he had found no more than one good general, Parmenio. He used also to say that an army of deer commanded by a lion would excel an army of lions under the leadership of a deer. And so Caius Cæsar, when going into Spain to campaign against Petreius, declared that he held him cheap because he was going to an army without a general. And when Caius Fabricius heard that the Romans had been beaten by Pyrrhus he said, "It is not the Epirotes who have beaten the Romans, but Pyrrhus." And indeed the case of Marcus Coriolanus clearly shows (according to Livy) that the Roman superiority lay in their generals rather than in their army; for when Coriolanus took command of the Volscians, they were victors though they had always before been vanquished by the Romans.

Appian, Pref. to  
Rom. Hist.  
Tacitus, Annals, bk. 3.

Plut., Apoph.  
Livy, bk. 2.

Hence Epicrates, when discoursing on the military art, says that an army is comparable to an animal much like a man, the general being its head, the drawn-up battle array being the breast and trunk, the infantry being the hands, and the cavalry the feet. And just as, in the case of the body, when the head is disturbed and upset, the other members can not discharge their functions; so when the general is discomposed his army can not but waver and fall into peril and ruin.

And after Alexander's death Leosthenes compared his army (which was wandering about and knocking up against itself) to the Cyclops, who after the loss of his eye kept poking out his hands as far as he could, but not in any definite direction, and similarly after the loss of its general an army with its great bulk is convulsed by unregulated movements. And just as, after the departure of the soul, the corpse does not remain holding together, but is scattered abroad in dissolution, so was Alexander's army, after his death, a prey to tremors and was jostled about and tossed to and fro.

Plut., On fortune  
and valor  
of Alex., orat. 2.

And indeed the greater the difficulties which a war presents, the more care should be bestowed in preparing for it (as said above); but if less, we must try to get a general the equal of the opposing general, for (as Quintus Fabius used to say) any sailor or passenger can manage the helm in a calm sea, but when a gale springs up and the vessel is swept by the wind over a stormy sea, then a man and a helmsman is required.

Livy, ch. 24.

[4] On these grounds Plato laid it down that no one ought to be put in charge of a military expedition before his thirtieth year, not even if of well-approved valor and covered with military glory. And this was the age which the Athenians adopted as the statutory age for military office, although they at times allowed exceptions to the rule, notably in the case of Alcibiades, who was such a favorite of the populace in his early manhood that he drew on him the eyes of all whenever he appeared in public, and no one at Athens was reckoned his equal. He was given command in the Syracusan war before attaining the statutory age. Two much older men, however, were given him as colleagues, Nicias and Lysimachus, in order the better to guard the interests of the State.

[5] The Romans, too, had their *leges annales* whereby a greater age still was required for the consulship (out of mistrust of the rashness of youth) and for other magistracies. The men of olden time, however, had not these *leges annales*, really old as they were (so Cicero says), but they were introduced many years later, by the rivalry for office, in order that the struggle for the several steps of office might take place between men of the same age, the result being (as Cicero also tells us) that in many instances great capacities for virtue were extinguished before they could be of service to the State. But the men of earlier days, who held that they ought not to expect an outstanding and surpassing virtue to increase with years, promoted persons to honor according as they excelled in virtue without taking into account either age or family or any

other attribute, but simply reckoning each man at his proper value: this appears from Dionysius.

Rom. antiq., bk. 6.

“Indeed,” says Cicero, “in olden times the Rulli, Decii, Corvini, and many others, and in more recent days the elder Africanus and Titus Flaminius, having been elected consuls quite as youths, achieved such exploits that they have increased the power and adorned the name of the Roman people. Nay, did not Alexander of Macedon meet his death when he was thirty-two, having begun to perform the greatest exploits from the very outset of his life? And this is ten years earlier than our laws permit men to be consuls.”

Philipp. 5.

Whence (as the same Cicero tells us) it can be perceived that the development of valor is quicker than that of age. Further, Valerius Corvinus, who was made consul in his twenty-third year, used to say that the consulship was the reward of merit and not of blood: and Lucius Quintius Cincinnatus, a very poor man, owning only four acres of land and cultivating them with his own hand, was summoned from the plough to Rome to assume the dictatorship, being the only hope of the Roman people. And this, says Livy, it is worth while for those to hear who despise all things human except riches, and imagine that there is no great scope for honor and virtue save where there is abundance of wealth. Those again who were sent by the Senate to Attilius to summon him to assume the sovereignty of the Roman people, saw him sowing seed, yet those hands worn with rustic toil established the public safety and hurled to the ground the huge forces of the enemy.

Bk. 3.

Val. Max., bk. 4,  
ch. 4.  
Pro lege Manil.

[6, 7] Again, Cicero holds that a general ought to possess the following four qualities: knowledge of the military art, valor, authority and good fortune; and that the foremost merits of a general are the following: industry in affairs, bravery in dangers, assiduity in action, promptitude in execution, prudence in planning. Yet nothing worthy of high praise will be accomplished without practice and exercise, for in the art of a general as in other arts three things are requisite, natural aptitude, education, and experience—natural aptitude being disclosed in the man’s intelligence, education in his knowledge, and experience by its products.

[8] Now since events correspond to one another nowhere less than in war (and so, as Hannibal said to Scipio, the least possible reliance is to be placed on even the best stroke of good fortune), a general must give great heed not rashly to engage with the enemy, staking all on the doubtful cast of battle; but rather to pursue safety on principle than success at haphazard. Let principle guide him, not chance, for the latter is deceptive and by small causes produces vast mutations of fortune. We read accordingly how Cæsar became more and more reluctant to engage in battle towards the end of his life, deeming that the more victories he had won the less reliance was to be placed on the happenings of chance and that he would not gain by victory as much as disaster would cost him.

Suetonius, *Life*  
of C. Cæsar.

[9] And, indeed, just as successful achievements secure the goodwill of an army (as Cæsar said), so ill-success secures ill-favor: and so a general will be acting more shrewdly, more safely, and more gloriously (according to the opinion of Pericles), to overcome his enemy whenever he can by intellect and reason rather than by the sword, for since the works of the mind rank above those of the body (as Cicero says) so we derive more satisfaction from the conquests of our intellect than from those of our strength. And this is taken to have been the meaning of the custom of the Lacedæmonians, whereby a general who had won a victory with much bloodshed and great slaughter of the enemy sacrificed a cock in lieu of a trophy, whereas one who by obtaining a surrender and by a treaty and by his assiduity had won a not over-bloody victory and had avoided the worst evils of war, sacrificed a bull.

Dion, too, says in his *De regno*, that far greater things are accomplished by the shrewdness of a few than by numbers and strength, a fact which Homer is adverting to when he introduces Agamemnon as asserting that he could much more easily settle Troy's business if he had ten Nestors or Ulysses for counsel than as many Ajaxes and Achilles for stout fighting. That is the drift of the speech of Ulysses to Ajax found

Metamorph. 13. in Ovid:

Quippe manu fortes, nec sunt mihi Marte secundi:  
 Consiliis cessere meis: tibi dextera bello  
 Utilis: ingenium est quod eget moderamine nostro.  
 Tu vires sine mente geris: mihi cura futuri est:  
 Tu pugnare potes; pugnandi tempora mecum  
 Eligit Atrides: tu tantum corpore prodes;  
 Nos animo: quantoque ratem qui temperat, anteit  
 Remigiis officium: quanto est dux milite major:  
 Tantum ego te supero: nec non in corpore nostro  
 Pectora sunt potiora manu: vigor omnis in illis.

\* [All these had been my rivals in the shield,  
 And yet all these to my pretensions yield.  
 Thy boisterous hands are then of use, when I  
 With this directing head those hands apply.  
 Brawn without brain is thine; my prudent care  
 Foresees, provides, administers the war:  
 Thy province is to fight; but when shall be  
 The time to fight, the king consults with me.  
 No dram of judgment with thy force is joined;  
 Thy body is of profit, and my mind.  
 By how much more the ship her safety owes  
 To him who steers, than him that only rows;  
 By how much more the captain merits praise  
 Than he who fights, and, fighting, but obeys;  
 By so much greater is my worth than thine,  
 Who canst but execute what I design.  
 What gain'st thou, brutal man, if I confess  
 Thy strength superior, when thy wit is less?  
 Mind is the man: I claim my whole desert  
 From the mind's vigor, and the immortal part.]

\* Translation by John Dryden.

And so on, in Ovid's poem, where he tells how the armor of Achilles, for which Ulysses strove with Ajax and which was offered to the worthier, was awarded to Ulysses.

Therefore glory resides not alone in bodily strength and in mighty muscles, but rather in moral virtues (as Ambrosius says). Wherefore also the giants whom we read of in Holy Writ, much as they excelled in strength and bulk, yet because they had not wisdom perished because of their foolishness; while on the other hand it is written of the wise man, "There arose a knowing son and through him was overthrown all the power of the enemy."

*De offic.*, bk. 1.

*Baruch*, ch. 3.

*Eccles.*, ch. 47.

[10] A discreet and wise general, then, according to the teaching of Euripides, is to be preferred to a daring and rash one, since (as the same writer said) a great force of soldiers can be overcome by wise counsel. And so Xerxes, who led so many thousand men against the Greeks, was beaten by the efforts of one man, Themistocles. Aristides, accordingly, used to say that arms were not the only resource against an enemy, but that counsel was the first resource; for, when we can escape from superior strength by planning and diligence what boots it to encounter dangers?

[11] Hence military experts discern exceptional merit in a general who carries on war on such a principle that he and his army are provided, in the most convenient way, with food and water and wood and fodder, while the enemy on the other hand is deprived of all these and driven to surrender, if possible, by famine: and who, though he may think that he could join battle with great safety, yet deems it safer, by holding roads and cutting off supplies, to gain a woundless victory.

This was the principle which especially commended itself to that consummate general, Julius Cæsar, who determined not to join battle with Afranius and Petreius (of Pompey's faction) unless absolutely compelled, for he had set before himself the hope of being able to finish off that business without a fight and without one of his soldiers receiving a wound, by cutting off the food-supplies of his adversaries, asking himself why he need lose any of his men, even in a successful engagement, and why he should allow troops who had deserved so well of him to be wounded, and why, in a word, he should run the risks of fortune, especially as it was no whit less a general's business to overcome by strategy than by the sword. And in the end he compelled his adversaries to surrender by stress of utter want. And on the same principle Pompey might easily have crushed Cæsar at Pharsalus through his lack of everything, as he had planned to do, had not he suffered himself to be diverted from his plan by his soldiers in their elation after the victory of Dyrrhachium. But it was Fabius Maximus who won the greatest renown in this class of warfare, even according to the testimony of his enemy Hannibal, who said that Fabius, when not fighting, inspired him with greater fear than Marcellus did when fighting; and his opinion was not at fault,

*Caes.*, Civil war, bk. 1.

*Appian*, Civil war, bk. 2.

for Fabius by his devices and by sitting quiet had already reduced Hannibal to such a condition that he not only had no provisions left of what he had seized day by day, but nowhere to seize any for the future, as all the corn had been gathered from all sides into the fortified cities when the open country had become insecure, so that provisions for hardly ten days were left (as subsequently was discovered), and it had been arranged, in the event of a decision to await the seasonable ripening of the crops, that the Spaniards should return home because of the dearth of supplies. All this the consul Terentius Varro upset by his rashness; and although on his arrival Hannibal, who was surrounded by these difficulties, saw that the enemy's forces were augmented by a half, he was exceedingly glad, for he hoped (as really happened) that fortune would give play to the preposterous disposition and rashness of the consul; and by the blun-

Livy, bk. 22.

der of this man that terrible disaster of Cannæ befell the Romans. Caius Sulpicius, dictator against the Gauls, also adopted the same system, and was in no way inclined to trust himself to fortune, there being no stress of circumstance, against an enemy whom lapse of time and the strangeness of the locality were weakening day by day, and who was lingering without any organized commissariat or solid means of defense. Moreover, those minds and bodies which derive all their

Livy, bk. 7.

strength from attack find their strength lessened and enfeebled by delay. Indeed, when Alexander was besieging Leucadia, he let every one from the neighborhood take refuge there in order that their store of provisions might be consumed all the quicker, and after this was consumed he gained an easy victory. Antigonus, also, after ravaging the territory of Athens, departed at the sowing-season, and when their remaining corn had been used for sowing purposes he returned and again destroyed their actually grown corn, and reduced the Athenians into his power when they were exhausted by hunger.

We ought, therefore, to bear in mind the advice which Cambyses gave to his son Cyrus, never to be overtaken by lack of supply, but in times of plenty to bear scarcity carefully in mind; for it is more common to see an army worn out by want than by battle, hunger being (in the words of Vegetius) keener than the sword.

Accordingly, as we have said, it is by such devices before all that an enemy is to be overcome; and rash joinder of battle should be avoided save where the circumstances imperatively demand it, after the example set by Scipio who, when he was sent against the Numantines and saw the boldness, bordering on madness, of the enemy, said that he would in time visit the enemy's boldness on him and that it was the part of wisdom to exploit the folly of others, for a good general, like a good doctor, ought to use steel for curing ills only in the last resort. None the less, he

Plut., Apoph. rose up in his own good time and overthrew the Numantines.

Side by side with this may be placed the advice of Sertorius, who, at the time of Sulla's proscription, was compelled to become commander of the Lusitani and, being unable to divert them by speech from joining battle with the whole Roman force, brought out before them two horses, the one very strong and the other very weak; and then he had the tail of the former plucked hair after hair by a decrepit old man and the whole tail of the latter tugged at by a young man of exceptional strength, thus suggesting that the Roman army was like a horse's tail, portions of which any one who tried could destroy, while he who attempted to destroy it as a whole would more speedily yield up the victory than gain it. By this illustration Sertorius brought round to his way of thinking those barbarians whom he could not bend by argument.

[12] Further, just as one ought not rashly to tempt fortune and undertake difficult tasks, so when one has once begun them they ought not to be lightly given up. Of this Marcellus gave an example on the occasion when the Roman soldiery, rashly approaching the walls during the siege of Casilinum, sustained many wounds without any corresponding degree of success. Fabius was then of opinion that this minor operation, which was just as difficult as a major one, should be forborne and stopped, as graver matters were pressing, but Marcellus urged that, though there were many exploits which great generals would not attempt, yet, when once they were begun, they ought not to be given up, because the influence of rumor would be great one way or the other, and he insisted that the undertaking should not be abandoned.

Livy, bk. 24.

The conduct of Cæsar's troops, then, at the siege of Avaricum was worthy of all praise. They were beset by all manner of difficulties and Cæsar told them that he was purposing to raise the siege for want of supplies, but they one and all begged him not to leave the matter unfinished, saying that it would be a standing ignominy to themselves if they abandoned a siege which they had begun and that the great influence of rumor on war was rightly admitted by the best generals, and that he who retires was deemed to have been put to flight.

Caes., Gallic war, bk. 7.

[13] Accordingly, as in other affairs so especially in war, perseverance and confidence are most excellent qualities in a general and often produce the most important results on the whole issue of a war. Of this the Romans furnish us with striking illustrations; and notably so after their defeat at Cannæ, when, though the resources of their State were exhausted, they dared to send reinforcements into Spain and, while Hannibal was actually knocking with his army at the Porta Capena, they prevented the site of the enemy's camp from being sold for less than if the Carthaginians were not in occupation of it. Such conduct as this (says Valerius Maximus), what else is it than to overcome adverse fortune by one's self-respect and turn its ragings into benefits? And that is the meaning of Cæsar's saying that if all things are not going well, ill-fortune can be mitigated by effort.

Bk. 3, ch. 7.

In the same spirit of confidence Scipio Africanus neither punished the spies of Hannibal who had been captured in his camp nor interrogated them about the plans and resources of the Carthaginians, but had them handed over to the military tribunes and bidden to observe everything without any fear and be taken whithersoever in the camp they wanted to go; and then, having asked them whether they had explored everything with complete convenience, he provided them with an escort and sent them back to Hannibal. And by this display of absolute confidence (as Valerius Maximus says) Scipio inflicted a blow on the spirits of his enemy instead of on the enemy's arms, for Hannibal was so exceedingly struck by the confidence of his enemy that he forthwith sent a messenger to Scipio begging for an opportunity of an interview, with the idea that he would be able to obtain more equal terms of peace if he sought peace with strength unimpaired instead of after a defeat.

Bk. 3, ch. 7.

Livy, bk. 30.

[14] Further, generals of great renown, with their clear perception of the great advantages of perseverance and confidence, are in the habit of so acting before an engagement as to inspire their army with the utmost degree of confidence in themselves and in that way to fortify the spirits of their troops. This they used to do in divers ways. The dictator Valerius Corvinus, when making war with the Samnites, before giving the signal of battle would spend some days in skirmishes for the purpose of sampling the enemy, so as that the novelty of battle and of the enemy should not frighten his men. The consul Quintus Fabius, on the eve of engagement with the Etruscans, in order to revive the spirits of his troops, whom the enemy's numbers had alarmed, sang the praises of the Samnite wars which they had brought to a very successful issue and disparaged the Etruscans, saying that the one enemy could not be compared with the other, nor the one array with the other, and furthermore that they would know in course of time about another secret missile concerning which he must meanwhile keep silence; and in this enigmatical manner he feigned that the enemy was duped and marvellously fortified his troops. And undoubtedly the ingenuity of Fabius in this course deserves praise and imitation by generals, for it is a common weakness of human nature (as Cæsar said) to place too great reliance on the unseen, hidden, and unknown, and also to be overmuch terrified thereby; and (says Livy) the false, posing as true, has frequently been of the greatest service in war.

Livy, bk. 7.

Livy, bk. 9.

Civil war, bk. 2.

Men of old, too, deemed it peculiarly the business of religion to fortify the spirits of their troops. And that is the explanation of all the auspices and oracles: if perchance these seemed to portend some mischance, generals would sometimes, by an adroit interpretation, twist it into a good augury in order to rid their troops of fear. Innumerable instances of this are extant.

[15] Now, just as there must be much done in the way of fortifying the spirits of the soldiery, so also a great point should be made of keeping back everything that might cause them alarm or in any way upset their minds; for (as Cæsar said) one conceals a wound of the body, and in the same way any evil plight of the army should be concealed, lest by its disclosure the troops should be alarmed and the enemy emboldened. In this respect the conduct of Terentius Varro, after the defeat of Cannæ, is rightly held blameworthy; for when the Campanians sent envoys to him to Venusia, whither he had come with a scanty half-armed band, he so added to their disdain of his circumstances and person by over-disclosure and revelation of the defeat, that the legates, who had already delivered their message, which was, that they were distressed that any misfortune should have befallen the Romans, and who had promised all assistance in prosecuting the war, returned home and reported (such was their disdain of the consul and of his speech in which he despaired of everything) that the very name of the Romans seemed as it were blotted out; and this made all the Campanians inclined to a revolt, assured that they would be able to gain the overlordship of Italy, and they, accordingly, made a treaty with Hannibal.

Livy, bk. 22.

In the same way Philip, King of Macedon, conceived the unwise idea that he would advance somewhat in the affections of his men and that they would be rendered more keen to incur danger on his behalf if he had some horse-soldiers buried who had fallen in a slight skirmish with the Romans; so he ordered the bodies to be fetched into the camp, so that every one might notice the funeral honor. Yet, what he thought would make his men readier to risk all combats, simply produced alarm and backwardness; for those who had seen the wounds made by spears and arrows and occasionally by lances in the wars which they had been accustomed to carry on with Greeks and Illyrians, when they beheld bodies shorn by the Spanish sword, arms cut off, the whole skull split open, heads severed from the body, protruding entrails, and other horrible kinds of wounds, were on all sides thunderstruck to perceive the sort of weapon and of men they had to fight against.

Livy, bk. 31.

Similarly, when the Romans saw that the populace was upset and frightened by the sight of the corpse of the consul Publius Rutilius Lupus, who fell in the Social war, and of the corpses of not a few other nobles, which had been brought back into the city, the Senate by decree ordained that thenceforth the bodies of those killed in war should be buried where they had fallen, so that the sight of them should not make the survivors more backward in their military service. This ordinance was soon noised abroad and even the enemy copied it.

Appian, Civil war,  
bk. 1.

[16] Now Chabrias, the Athenian general, used to say that the best general was he who got to know most of the affairs of the enemy; and we do indeed read how ignorance of these has led to the rout of

Plut., Apoph.

many armies and how it has not seldom brought down into a critical condition those who were at the height of their prosperity. Thus, when Cassius was beaten on his wing by Cæsar's troops and driven from his camp, he committed suicide in despair because he thought that Brutus too was overcome, although the wing of Brutus was really successful. During a great battle between the Romans and the Volscians, night separated the combatants before an issue was arrived at, and (by an error similar to the foregoing) so great fear seized on both camps, owing to their ignorance of the result, that both armies left their wounded and a large part of their baggage and betook themselves to the neighboring hills as if they had been beaten. And Curio, Cæsar's legate in the civil war, putting undue trust in fugitives who reported that King Juba (who had joined Pompey with large reinforcements) had been summoned to a neighboring war, and that his prefect Suburra had been despatched with only a moderate force, rashly joined battle and, being surrounded with his army by the royal forces, was cut to pieces.

Livy, bk. 4.

Caes., Civil war, bk. 2.

[17] Accordingly, since (as Cicero says) it is a fault of human nature to believe greedily what we wish for and to expect others to think the same as we do, we ought to be very slow to trust fugitives and spies. And in this respect Cæsar, aforementioned, finds fault with the habits of the Gauls. They often, says he, engage in resolutions concerning the most important matters, induced by nothing more than reports and stories, of which they must forthwith repent, since they yield to mere unsifted reports and since they receive from most people answers framed agreeably to their wishes. It is therefore fitting that those who hold command should go out in person to examine, when any unusual difficulties arise, as Marcellus did, saying to his colleague, "Nay, we will go ourselves to examine, with a few horsemen, since things which are brought before our eyes will furnish a more certain basis for counsel."

[18] Again, it will be in the highest degree profitable for a general to lead in person in all enterprises of hardship and difficulty, for when you wish to enjoin anything on a subordinate, if you first impose the obligation on yourself and your own people, you will more easily render every one obedient. Accordingly a good general should imitate that brave and strenuous leader Gideon, whom God raised up and gave to the Jewish people. He addressed his men as follows: "What you shall see me do, do ye also." For (as Seneca says) good health flows from the head into the rest of the members. And in this connection there are the noble words of Valerius Corvinus, who said:

"As they ought to go into the field, every man trusting in his own manhood and glorious warfare, so should they have an eye under whose leading and regimen they were to enter into battle: whether he were a man that in the hearing of his soldiers could only make goodly and magnificent orations, fierce but in words, void of military works, or he who

himself knew how to handle his weapon, to advance before the standards, yea, and to be employed even in the middle medley of all the battle. I would have you, my soldiers, to follow my deeds and not my words, and of me to learn not only discipline but also good example, who by this right hand of mine attained unto three consulships and to the highest honor."

Livy, bk. 7.

In this fashion, also, Caius Cæsar often restored order to a disordered line of battle, opposing himself to the fugitives, and holding them back individually, and turning them on the enemy with a wrench of the throat. And so in that doubtful battle which he fought with the younger Pompey in Spain, when his soldiers were fighting in a half-hearted way because of their fear, and matters were in a critical condition and his exhortations produced no effect—he snatched up a man's shield and rebuking his soldiers he rushed on the enemy saying, "Now is the end of my life and of your soldiering." By this act, their fear giving place to shame, he restored order to the line of battle, after having received two hundred darts in his shield.

Suetonius on Caesar.

Appian, Civil war, bk. 2.

[19] Here, however, it is above all essential that the object of this activity on the general's part is to make his men readier to undergo some danger by his own readiness; but he must not rashly expose himself to danger, especially if he holds the supreme command, save where absolute necessity requires and where the issue of the whole war is involved. For we read that numerous cities have been ruined, and even more armies routed and put to flight, by the general's rash death. Thus the death of Publius Scipio in Spain, due to his exposing himself overmuch to the enemy's missiles, led beyond doubt to the victory of the enemy and the defeat of the Romans. And the wound of Cnæus Scipio at Munda, when the Romans were markedly getting the upper hand, struck terror into his men, anxious as they were about their commander's health, and proved an obstacle to an indubitable and glorious victory. So also when Hannibal fell wounded at the siege of Saguntum, having too carelessly approached the wall, there was such a flight and flutter round about him that the works and pent-houses were almost deserted. So when Epaminondas fell, who did the duty not only of general but of the bravest soldier, there fell with him all the energies of Thebes, for (as Justinus says) just as by smashing the edge of a dart you take from the rest of the missile its power to hurt, so when that great Theban general was removed, who was (as it were) the point of their dart, the energies of the State were blunted, so that it did not seem that they had merely lost him, but that with him all the energies of the Thebans had died out.

Livy, bk. 24.

Livy, bk. 21.

Bk. 6.

Let not leaders, therefore, put overmuch confidence in fickle fortune, not even in the shield of Jupiter, under which (according to Homer) they dwell; but in incurring dangers let them (says Cicero) copy the custom of doctors, who employ mild remedies for mild dis-

Offic., bk. 1.

orders, though they have to use more risky methods in more serious diseases. This is what the saying of Æmilius Paulus points to, uttered at the banquet with which, after the defeat of Perseus, he was celebrating his victory: i. e., that it is the same kind of skill that keeps an army really terrible to enemies as keeps a banquet really pleasant to friends. And Scipio Africanus, when taxed with being too little of a fighter, replied, "My mother bore me to be a general, not a fighter," meaning to show that the secret of success in arms lies rather in one man's knowledge and genius than in the arms and strength of many; for the arts of generalship and of soldiering are not identical.

[20] Further, a general, and more especially a sovereign prince, should bear in mind the counsel of Antigonus. He was tossed about by a violent storm, having all his family with him in the same ship, and he is reported to have enjoined on his children, for their own remembrance and for them to pass on to their issue, Not to dare to subject the whole of their race to a common danger at the same time. And mindful of this precept, Philip, when about to make war on the Romans, hesitated to trust his two sons at the same time to the hazard of whatever might by chance befall, and so he took the elder with him and sent the younger into Macedonia to assume the guardianship of his kingdom, thus copying the example of prudent heads of families who will not lay up the whole of their fortune in one place lest, if it should happen to be destroyed by earthquake or fire or war, their whole substance should be gone. And this is the meaning of that saying which is current among husbandmen and which Celsus reminds us of in a passage which Corasius expounds finely, Money without a fund laid by is a frail matter (*Pecunia sine peculio fragilis*).

Dig. 32, 79, 1.

Miscell. jur. civ.  
bk. 1, ch. 13.

Pro lege Manilia.

[21] Further, not only is valor in war (as Cicero says) to be looked for in a consummate and perfect general, but there are also many qualities which are excellent handmaids and companions of this valor. Now it is especially looked for in one who wants to govern others that he can govern himself and his desires, and that he exercises over himself, in the hardest and sternest manner possible, that mastery which he proposes to exercise over others; for he who can not restrain himself is also unable, as general, to restrain an army, nor can he be severe in judgment who will not let others be severe judges of himself. Let him therefore refrain his passions, despise pleasures, control his temper, check his greed, and chase away the other flaws of character. And to one of this character (as Cicero says) fortune herself surrenders, she who is said to wield the greatest power, especially in war, and who (as the wise poet has said) renders to every one according to his character. Just as it is narrated of Marcus Porcius Cato, a man endued with all the virtues, that he had such force of character and intellect that, wheresoever he had been born, he would seem able to mould his own fortune, alike in

Paradox.

Livy, bk. 39. military and in civil life.

And it was with reason believed that Alexander the Great would have been more successful had he conquered his pride and wrath, those unconquered evils, and the other faults of his character; he, however, whom the arms of the Persians could not overthrow, was vanquished by his vices. Agesilaus, too, that consummate general, used to say that he would rather conquer evil desires than take the greatest city of the enemy, because it was a finer thing for a man to preserve his own liberty than to take away that of other persons. And Scipio, deservedly, did not get greater glory by capturing Carthage than by restoring, inviolate and untouched, to her bridegroom Allucius, a captive girl of such surpassing beauty that wheresoever she went she drew the eyes of all upon her, the amount of her ransom being given to Allucius by way of dowry. And the same Scipio produced more effect in Spain by the reputation which he had won for himself for clemency and self-restraint than by the unconquered arms of the Romans. Poetic fictions, therefore, about monsters tamed by Hercules and slain tyrants, mean that the good general, put before us in the guise of Hercules, ought to restrain the corrupt affections of the soul.

[22] Further, when supreme command is given to any one, it will be a well-advised thing to allow him full discretion in the decision of matters of highest import, as did the Senate and people of Rome, who allowed the general full discretion in all things pertaining to war, and left it to his judgment whether it were best to conduct the campaign by sitting still or by fighting, and whether to besiege this or that town; nor did they reserve to themselves anything save the authority to declare a new war and to solemnize a treaty with the enemy, matters which, as we have shown elsewhere, pertain to sovereign power. Accordingly when the consul Quintus Fabius was sent against the Etruscans in order to relieve the Sutrini (allies of Rome), whom the Etruscans were besieging, after he had defeated the Etruscans in battle and put them to flight, he pursued the enemy, without the Senate's knowledge, through the Ciminian forest and carried the war into Etruria. And after the defeat of Antiochus, the consul Cnæus Manlius, without the authorization of the Senate or the command of the people, made war on the Gallogræci, for bearing aid to Antiochus; and as the legates who had been with him brought no charge against him he was carried in triumph into the City.

In the same way, after Cæsar, to whose lot the province of Gaul had fallen, had driven the Germans from Gaul he crossed the Rhine in order to make war on the Sicambri for that they had refused to surrender those who, after fighting against him and Gaul, had taken refuge in the territory of the Sicambri; and he, further, took an army over into Britain because he understood that in nearly all his battles in Gaul help had been furnished from that quarter to the enemies of the Romans. And all these things he did merely on his own authority.

Quint. Curt., bk. 6.

Plut., Apoph.

Livy, bk. 26.

See above, bk. 1,  
ch. 6.

Livy, bk. 9.

Livy, bk. 38.

Caes., Gallic war,  
bk. 4.

The conduct of the war against the pirates, again, was intrusted to Cnæus Pompey by the *Lex Gabinia* for three years in such wise that in the whole sea within the pillars of Hercules and in the maritime provinces up to the four hundredth furlong (*stadium*) from the sea, he had power to order kings and governors and states to furnish him with everything necessary for the conduct of that war. And the dictator Quintus Fabius Maximus received permission to do everything he thought beneficial to the republic. And the consul Titus Quintius was allowed full discretion to make peace or war with Philip.

Plut. on Pompey.  
Cic., pro lege Manil.  
Appian on Mithrid.

Livy, bk. 32.

Now in these respects you may deservedly bestow praise on the wisdom of the Roman Senate and people, for one who is dependent on the fears and intentions of another can not accomplish anything noteworthy. Moreover, it would have been difficult for the Senate to administer according to its own judgment matters which had not been brought before its eyes, and determine the sites for pitching camps and fix the places to be occupied by garrisons and the times for engaging the enemy and the times for lying quiet, and (as the saying goes) govern for the whole earth—especially as (in Livy's words) if the opportunity afforded by a moment's space flies past and you make ever so little delay, you will soon be seeking in vain to repair its loss.

Further, in order that generals might apply themselves to their lofty tasks with better spirit, in freedom from all anxieties and without being worried by the fear of punishment for their conduct of affairs, the Roman Senate and people, if an operation chanced to be mismanaged, laid the blame on the fortune of war alone and never took any over-cruel measures against them and never exacted (even from those who by rashness and ignorance had lost their armies) more than a pecuniary fine; and a capital charge was hardly ever brought against a general for mismanagement of a war, for they thought that the failure itself and the loss of praise was punishment enough.

An example of this was furnished by the case of Marcus Sergius and Publius Virginius, tribunes of the plebs with consular powers, in the war against Veii. For the enemy chanced to attack a camp in the district commanded by Marcus Sergius and the Romans were unable to protect themselves against the enemy and their only hope was in assistance from the larger camps within the command of Virginius. Now Sergius was in private life a bitter foe of Virginius, and Virginius refused to send help to his colleague unless he begged for it, and Sergius, rather than be seen to have begged help from his foe, preferred to be conquered by the enemy to conquering by the aid of a fellow-citizen. The one, accordingly, was as obstinate as the other was proud. And so it came about that between the two camps the slaughter of soldiers went on for some time, and at last the defenses were abandoned and some few reached the larger camps and the greater part, including Sergius himself, pushed on

to Rome. And there each party's case was discussed in the Senate and before the people on an appointed day and the guilty parties were only fined ten thousand heavy asses each.

Livy, bk. 5.

In the same way Marcus Postumius, tribune of the plebs with military power, was also fined ten thousand heavy asses for causing the loss of a battle at Veii. And the consul Caius Sempronius was fined fifteen thousand asses for his failure in the Volscian war. And the only case that I can find in which a capital charge was brought is that of the prætor, Cnæus Fulvius, for his loss of an army in Apulia—in which case he was loaded with all opprobrium and many declared on oath that the panic and flight began with the prætor himself and that the soldiers turned their backs only when deserted by him, for they could not think their general's fear to be ill-grounded. However, before the day of the assembly of the people arrived he went into exile to Tarquinii.

Livy, bk. 4.  
Livy, bk. 36.

But many years before that, Spurius Servilius, on giving up his consulship, was capitally accused, on an appointed day, by the tribune of the plebs, who alleged that when the Etruscans were fleeing to their camp he had followed them up more keenly than was wise and so had lost a picked body of men. The patricians, however, treated this as a most unworthy proceeding, insisting that it was intolerable that those who had indefatigably offered themselves to the enemy on behalf of the State should be accused of cowardice, when fortune frowned, by persons who had never taken their place in the battle line, and they so prevailed with the people that the votes of all were cast for an acquittal, thus proving that it was not for the good of the State that generals should be condemned for want of success.

Dion. Halic., Rom. antiq., bk. 9.

Nay, even in the case of the consul Caius Terentius Varro, whose rashness and neglect of the advice of his colleague Lucius Æmilius Paulus brought to the Romans the terrible defeat of Cannæ, and who had forthwith fled, leaving behind him his army and his colleague who had bravely died, no reproach was addressed to him for his mismanagement, but a crowd went out to meet him on his return even from so great a defeat and tendered him thanks for not despairing of the commonwealth—whereas if he had been a Carthaginian general no punishment would have been thought too great for him.

Livy, bk. 22.

[23] For the Carthaginians were so stern in the business of war that they crucified generals who had pursued unwise plans, even though they had been successful, imputing their successes to the help of the immortal gods and their errors to their own fault. And so that renowned Carthaginian general Mago, who was the first to found the empire of the Carthaginians upon an ordered military discipline, and who consolidated the strength of his State not less by his skill in war than by his valor, slew himself through fear of punishment for a failure against the

Val. Max., bk. 2, ch. 7.  
Livy, bk. 38.

Justin, bk. 19.

Syracusans; and the Carthaginians, not satisfied with this, crucified the corpse of the dead man.

Plutarch, Life of Timoleon.

Further, it should be stated that this wide and large power of dealing at discretion with the loftiest concerns which is granted to a general should be very much restricted in the case of a master of the horse or tribune or other subordinate commander (as we shall say in the proper place). And, indeed, however freely a general is allowed to administer everything at his own discretion, yet he will be liable if he acts fraudulently, for (as Scævola says) he is taken to have received plenary power, but only within the limits of *bona fide* conduct; and whenever a man receives a discretionary trust the test to which its exercise is referred is in all cases the standard of the ordinarily prudent man.

Below, On the office of legate and tribune.

Dig. 17, 1, 60, 4.

Dig. 50, 17, 22, 1; and 18, 1, 7; and 19, 2, 24; and 17, 2, 6.

## CHAPTER III.

Here follow some propositions relating to war and cautions for commanders, affirmed by the examples of men of old.

*There should be one head of an army, and not more; with full power; and permanently appointed; and not a man who has previously been reprimanded or disgraced.*

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. A divided command in war is useless.</li> <li>2. On what occasions the Romans used to appoint a dictator.</li> <li>3. The power of a dictator.</li> </ol> | <ol style="list-style-type: none"> <li>4. A successor should not be sent to a general until the war is over.</li> <li>5. Monarchy the best form of government.</li> <li>6. Dangerous to intrust supreme command to one whom you have criticized.</li> </ol> |
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[1] The four tribunes with military power who were appointed at Rome, three of whom set out for Veii after the levy was made, furnish proof (says Livy) that it is useless to split up the command in war among a number of persons; for each followed his own plans, one taking one line and another another line, and so they furnished the enemy with advantageous openings; and while their battle-line was in confusion and some were ordering the trumpets to sound the advance and others the retreat, the Veians attacked at the favorable moment and drove them to flight. And it was the same when Lucius Æmilius Paulus and Terentius Varro were opposed to Hannibal. And so also, not long ago, when the princes of Germany contended with Charles V, to their great loss. You can not properly split up the command among a number. Bk. 4.

[2] And so when some serious war or civil strife threw their State into disorder, the Greeks and Romans used to take refuge in the commandership of some one man—dictator or archon or harmost—as on some holy anchor. Hence when the Romans were overcome by the Veians, “the sorrowing State (says Livy), unaccustomed to defeat, resorted to the appointment of a dictator.” And elsewhere Livy says: “When the people at home raised a tumult and matters pointed to a very serious sedition, the fear-stricken Senate employed their two last resources, viz., sovereign power and the most distinguished citizen; and it was decided to appoint a dictator and Marcus Furius Camillus was nominated.” And so when Flaminius, with the greater part of his army, was killed at Thrasymenus and there was much alarm at Rome, the State (says Livy) fled to a remedy which had long been called for but not yet Bk. 22.

applied, namely the appointment of a dictator. And the same writer  
 Bk. 16. tells us how the men of Præneste relied on a civil discord at Rome to lay waste the Roman territory with a hastily gathered force and to bring their standard right up to the Colline Gate; but the Romans turned from civil discord to war and made Titus Quintius Cincinnatus dictator. And when this was noised abroad, the enemy (such was their fear of this magistrate) withdrew at once from the walls and the younger Romans assembled on his command without demur.

Bk. 5. It is, accordingly, not rash to accept Livy's view, that the Gauls would not have captured the city of Rome if she, when driven to her last resources by her numerous troubles, had done as she would have done against her enemies of Fidenæ and Veii and other neighboring peoples and had appointed a dictator against this new and unheard-of foe, who was bringing up war from the ocean and the furthest shores of the earth.

[3] Now when a dictator had been duly appointed by law, he was vested with sovereign authority in matters of war and peace and punishment and reward without appeal, so that he might the better discharge the duties of sovereignty, in freedom from all hindrances. And so when  
 Pomponius in Dig. 1, 2, 2, 18. the consuls Titus Quintius and Agrippa Furius were on an expedition against the Æquians and Volscians, as there were two consuls with equal power in the Roman army the supreme command was resigned by Agrippa into the hands of his colleague (a thing which, according to  
 Bk. 3. Livy, is of very great service in the administration of great affairs). In the same way the distinguished Aristides, who was one of the Athenian generals at the battle of Marathon, as several generals had been appointed with equal power according to the Athenian custom, made over the sole command to his colleague Miltiades and induced his other colleagues to do the same. And it is clear that that proposal, removing, as it did, all rivalries, procured for the Athenians their most glorious victory over the Medes.  
 Plutarch, Aristides.

[4] Now we showed in the preceding chapter how important it is to allow a general free power of providing for the highest interests. Further, since it is undesirable to make a breach of continuity in matters which are best despatched under a uniform administration, a successor to a general should not be appointed save at the completion of a war; for what with the transfer of the generalship and the newness of the successor, who has to give himself up to the things that require learning before the things that require doing, opportunities of successful operations often fall through. That is why Fabius Maximus urged the people to use great care to appoint consuls who could show themselves Hannibal's equals. "For" (said he) "when we have chosen the best warrior and captain in the whole city, then presently, without any longer delay, being elect for one year, he shall be sent to match with an old captain that hath ever continued in the field, one that is not inclosed within com-

pass of time or the strait bounds of law or prevented from managing and ordering everything according as the occasions of war require; whereas by that time that we can make all ready to begin our affairs, the year is come about and clean gone."

Livy, bk. 24.

Accordingly when Livy is comparing the Roman generals with Alexander he makes them out to be more remarkable than Alexander or any other king because the dictatorship was held for periods of ten or twenty days only and no one held a consulship more than a year; the levies were delayed by the tribune of the people; they started for the war late and were recalled early because of the assembly (*comitia*); their year of office expired at the very crisis of the campaign; at one time a colleague's rashness and at another time his perversity hindered or hurt; after a miscarriage they succeeded to another's leavings; they were provided with a raw or an undisciplined army. While, by Hercules, says he, kings, in complete freedom from every kind of impediment, and masters also of circumstances and seasons, control all things in subserviency to their designs, and wait on no one. And over and above all these inconveniences, it was unreasonable, after one man had planted a tree, that another should gather the fruit of it, to borrow the words used by Quintus Fabius Maximus, when he was putting forward his claims to have Etruria assigned to him as an extraordinary province, on the strength of his having opened the Ciminian forest and made a way for the Roman arms, through passes until then impracticable.

Bk. 9.

Livy, bk. 10.

[5] Now by these proofs and illustrations much force is added to the opinion of those who have maintained that monarchy and royal power are the form of State most in harmony with universal nature, and the best. And so the Sibyl is said to have prophesied in her weirds that the well-being of the Roman State was in a monarchy and that its citizens could not otherwise find safety than by having a king. For (as Tiberius used to say) it can not be that a well-constituted State, which is but one body, should have several heads.

[6] Further, it will also be a most hazardous thing to put into the highest command a man whom you have had to criticize or visit with disgrace. Marcus Livius can be taken as an example of this. After his consulship he was condemned by the popular tribunal and, taking this disgrace to heart, he retired into the country, and then in the eighth year after his condemnation he was brought back into the city and made consul a second time. Now the story is preserved how Marcus Livius, being still embittered against the citizens, was cautioned by Quintus Fabius, when starting for the war against Hannibal, not rashly to join battle with any until he had found out of what kind they were, and he replied that he would fight with the first band of the enemy that he set eyes on; and when he was asked the reason for this hurry he said, "I

will either win distinction and glory from the enemy or from the conquered citizens, a pleasure which they owe me, however dishonorable.”

Livy, bk. 27. In like manner, when Astyages, King of the Medes, hating Harpagus for preserving his grandson Cyrus, slew the son of Harpagus by way of revenge and sent him to the father to be eaten, Harpagus dissimulated for a time his grief and postponed his hate of the king until an opportunity for retribution came; and afterwards, when Cyrus was making war on Astyages, the latter intrusted the supreme command to Harpagus, who surrendered his army to Cyrus as soon as he had received

Justin, bk. 1. it and took vengeance for the King's cruelty by a perfidious defection.

## CHAPTER IV.

*Whether gentleness and kindness or sternness and cruelty are the more advantageous in a general.*

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. No animal the management of which requires greater skill than man.</li> <li>2. Scipio by humane conduct and Hannibal by cruelty obtained equal renown in military matters.</li> <li>3. Manlius by severity and Valerius by kindness kept their soldiers in their duty.</li> <li>4. Heed must be given that overmuch gentleness does not produce contempt or overmuch harshness hatred.</li> <li>5. Kindness is required in a prince.</li> </ol> | <ol style="list-style-type: none"> <li>6. Love can not mingle with fear.</li> <li>7. A general will find courtesy to his soldiers more profitable than roughness of manner.</li> <li>8. Men desire to be treated with kindness and consideration.</li> <li>9. The habit of obedience allows a milder method of command.</li> <li>10. Kindness even to an enemy is of much avail.</li> </ol> |
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[1] We have said elsewhere that not merely valor in fighting is looked for in a consummate and perfect general, but that there are also other excellent qualities, hand-maidens and attendants of this virtue. And inasmuch as there is no animal (as Seneca perceived) the management of which requires greater skill than man, the question is frequently raised whether harshness and severity are more requisite in a commander than humaneness and kindness.

[2] In this controversy countless illustrations can be given on either side. First of all, Hannibal and Scipio present themselves, consummate generals who, with very unlike geniuses and even more unlike methods and principles, won equal glory in military matters. For when the latter was sent into Spain he not only conquered the affections of his soldiers by his inborn humaneness and kindliness, but he also, by the reputation for clemency which he had acquired, reduced the whole of Spain under the Roman sway. The former, on the other hand, laid waste Italy with great violence and cruelty and plundering, and all the peoples of Italy and almost all the towns defected to him, so that while Spain was reduced by the humaneness of Scipio, Italy was reduced by the fear which Hannibal inspired.

[3] We have a similar example in Manlius Torquatus and Valerius Corvinus, who lived at Rome with equal virtues and glory, yet with dissimilar dispositions and methods; for Manlius was naturally fierce and exceedingly severe in military discipline, but Valerius won the soldiers by all manner of humaneness and kindliness. This contrast was so marked that the former, with a view to keeping his soldiers in their duty, had his son flogged and beheaded when bringing precious spoils as victor

because he had engaged with the enemy without orders, while the latter found fault with no one: yet with all this difference in their modes of procedure they reaped no dissimilar results and glory. For no disaffection ever broke out among the soldiers of either general, nor did any shirk battle or disobey a command, and each of them accomplished great things. Thus Manlius with his sternness and peremptory edicts established military discipline in a wonderful manner; but Valerius, while paying just as much attention to military discipline, molded the minds of his men into obedient habits by his inborn humaneness and gentleness, and if he chanced to punish any contemners of law and discipline they put this down to the provisions of law and not to the general's severity; for he would not proceed against them in virtue of his sovereign authority (*imperium*) in cases where he could invoke legal process. These examples leave the question before us still an open one.

[4] Further, whichever course we adopt, great judgment and caution must be applied, on the one hand to prevent excessive leniency from producing contempt, as happened to Scipio, among whose soldiers a very serious disaffection broke out in Spain—and on the other hand to prevent excessive severity from producing hate, as happened to Hannibal, who by his cruelty and greed in laying waste the regions which he could not defend, so as to leave them bare for his enemy, alienated the minds of all, not only of those who suffered these indignities but of others also. Nay (as Livy says) the example affected a larger number than the misfortune.

[5] Now writers on the theory of kingship put Valerius and Scipio forward as better examples to copy, and demand in a king humaneness and kindness and such like virtues—as in Xenophon's book about Cyrus.

[6] Fear (as Cicero says) is a bad guardian as regards duration, while, on the other hand, kindness is a faithful one forever. And Prætextatus says, in Macrobius, "He who is revered is also loved: love can not be joined with fear. What do you think to be the origin of that most arrogant proverb which boasts, We have the same number of enemies as of slaves? We 'have' not the latter as enemies, but we make them so when we behave to them in a haughty, contemptuous, and cruel manner." Accordingly Ennius' lines are excellent:

Quem metuunt, oderunt;  
 Quem quisque odit, perisse expetit.

Whom they fear they hate; whom a man hates, he seeks to destroy.

[7] And, that no resources can withstand the hate of a number of people, Cicero shows by the death of Caius Cæsar. And this opinion concerning the death of the "Imperator" (Commander) is confirmed by the example of the consuls Appius Claudius and Titus Quintius. For when Appius was sent against the Volscians, he so harassed the army by

his harsh methods of command, and his roughness so caused the soldiers to become slack and slow and negligent and contumacious, and the minds of all were so embittered with hatred of the consul, that neither shame nor fear would move them, and it got to such a pitch that when the Roman army was drawn out in battle-array, it not only did not desire to win, but desired to be beaten, and made for the camp in disgraceful flight. But when Quintius, who was of a milder disposition, was sent against the Volscians, he won the affections of the soldiers by his courtesy and kindness and gave them all the booty with commendations thrown in (which are not less gratifying to soldiers' minds than rewards are), and after notable achievements he returned to the city.

Livy, bk 2.  
Dion. Halic., bk. 9.

So when the consul Cæso Fabius was sent against the men of Veii, besides manifesting many other virtues of a good commander in the preparation and conduct of the war, he so marshalled his line of battle that, by despatching his cavalry merely, he defeated the enemy's army; but the infantry, because they so hated the consul for his roughness of manner, would not follow up the defeated enemy and retreated with their standards without orders. Yet (says Livy) "the general wist not what way to remedy this so pestilent an example: so much have men, of excellent wits, been more wanting in skill to govern their fellow-citizens than to vanquish an enemy." Bk. 2.

In the same way the dictator Lucius Papyrius was neither popular with his soldiers nor terrible to his enemies—Agesilaus, however, thinks this the greatest praise that can be given to a general—because of the savagery with which he persisted in demanding the punishment of Marcus Fabius, his master of the horse, who had engaged with the enemy without his orders, albeit with success. And so, when the enemy approached the camp of Papyrius, such (says Livy) was the importance of that single man Papyrius that, if the zeal of the soldiery had seconded the plans of the general, it is reported as a thing beyond doubt that he could have completely crushed the Samnites on that day—he had drawn up his line of battle with such regard to ground and supports and had so strengthened it by every military device. But the soldiery made no exertions, and this of set purpose in order to injure the reputation of the general, and victory was prevented. The experienced general, however, perceived wherein lay the obstacle to his victory, i. e., that his temper must be curbed and austerity blended with courtesy; and so, with the utmost dexterity, by taking especial care of the wounded, he met with such success that through his attention to the healing of the soldiers' bodies he even earlier regained their affections; and, having re-created his army, he attacked the enemy, with complete assurance, both on his part and on that of his men, and defeated the Samnites and put them to flight. Bk. 8.

[8] Gravity must, therefore, be seasoned with affability. For, as Xenophon wisely writes, while other animals are brought into condition

by three methods conspicuously—by food when they are too low-spirited, by a lowering diet when they are over-lusty, and by the whip when they are obstinate—man, the most high-spirited animal of all, refuses to be coerced either by threats or by punishment, but he loves to be treated with kindness and good-will; for, while the brute creation allows itself to be dragged by violence, man will not be led except by reason.

[9] Nevertheless it must be remarked that the clemency of kings and of generals (as Alexander the Great used to say) is founded not only upon their own character, but upon the character of those who obey, for the habit of obedience allows a milder method of command. But where character has no reverence and we make no distinction between the highest and the lowest, there must needs be force in order to repel

Quint. Curt., bk. 8. force.

[10] And, further, kindness and humaneness are not only of advantage in dealing with soldiers and citizens, but also they have more than once been of greater avail in dealing with enemies than the unconquered Roman arms, as we have already shown by the case of Scipio. The case of Camillus, when he was besieging the Falisci, also illustrates the same truth; for it seemed that this was going to be an unending toil, had he not lured them to make surrender by his considerate act in handing to them the betrayer of their king's sons. The generosity of Fabricius, too, in informing Pyrrhus of the doctor's plot against his life, broke down and conquered the King's heart. And so humaneness (as Valerius Maximus says) conquers anger, lays hatred low, and mingles the enemy's tears with his blood.

Livy, bk. 5.

Val. Max., bk. 5,  
cb. 4.

## CHAPTER V.

*Times and seasons to be taken into account, above all in war.*

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| <ol style="list-style-type: none"> <li>1. The proper conduct in war is one thing, in peace another.</li> <li>2. In peace custom must be followed, in war expediency.</li> <li>3. The opinion of Fabius Maximus about the deserter Altinius.</li> <li>4. Marcellus preferred to conciliate Lucius Brantius by kindness rather than check him by punishment.</li> <li>5. Scipio Nasica overthrew Gracchus by summoning the good citizens on his own initiative.</li> </ol> | <ol style="list-style-type: none"> <li>6. Octavius Cæsar waged war on Antony of his own motion.</li> <li>7. Civil laws are silent in time of war.</li> <li>8. Necessity makes the unlawful lawful.</li> <li>9. That is not reckoned a breach of law which is done under pressure of necessity.</li> <li>10. On fit occasions the principle of a war must be altered.</li> <li>11. Fabius a slow-mover (<i>cunctator</i>) by nature, not by design.</li> </ol> |
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[1] Writers on obligations have laid down that in all actions very great heed is to be paid to times and seasons, especially in cases where chance is the dominating factor. And so, as Quintus Fabius Maximus used to tell his son, the consul Quintus Fabius Maximus, judgment and conduct are to be framed one way in the full heat of war and another way in the tranquillity of peace; for in peace those steps may, without hindrance, be taken which equity and justice indicate and we may take our stand upon the law; but in times of war and tumult remedies of this ordinary kind are frequently found to be irritants, and stimulants of war and strife, rather than sedatives. Hence it is often the case that, with the exception of what has been enacted to hold good in perpetuity as being permanently expedient, war abrogates the legislation of peace and vice versa, just as in navigation (as Livy says) one set of measures is employed in good weather and another in bad weather. Cod. 6, 51, pr.

[2] And so (says Cicero) our forefathers always submitted to the guidance of custom in peace and of expediency in war and always, as new emergencies arose, adapted new plans and principles to them; and in another passage he says, "In such a clash of disturbed affairs we can not but do what the times require rather than what is customary." Pro lege Manil. Philipp. 11.

[3] And this was the principle on which Quintus Fabius Maximus, the father, acted in the case of Classius Altinius of Arpi, who had come to the Roman camp secretly by night and promised that for a reward he would betray Arpi. Quintus Fabius Maximus would not allow him to be flogged and executed, as others thought he should be, for that after the defeat at Cannæ, instead of keeping faith through all changes of fortune, he had defected to Hannibal and carried Arpi with him in his defection and then when, contrary to his hope and wish, the fortunes of Rome (so

to say) rose again, he plans a new betrayal. Fabius, instead, determined that he ought to be set for an example to any such as himself who might be coming to their senses and bethinking themselves of their former friends, for if it were allowable to quit the Roman side, but not allowable to return to it, who could doubt that in a short space Rome would be found deserted by her allies and the whole of Italy bound by treaties with the Carthaginians? Still he did not think it right that any trust should be placed in Altinius, but, adopting a middle plan, that he should be treated as neither enemy nor friend.

Livy, bk. 24.

[4] It was so also at the time when Nola was in an exceedingly critical condition, Marcellus holding it not so much by means of his garrison as by the good-will of its nobles, and the commonalty verging on a revolt, which was a cause of much apprehension. The ringleader was Lucius Brantius, a young man of energy, whom the general agreement about the expected revolt and fear of the Roman prætor was prompting at one time to a betrayal of his country and at another to desertion. Marcellus perceived that he must either be restrained by punishment or won over by kindness and he thought it better to attach to himself than to drive over to the enemy so brave and active an ally. Accordingly he had him brought, and so worked on the mind of the wild young man by his courtesy and by rewards into the bargain that thenceforward none of the allies served the Roman State with greater bravery and fidelity. But as regards the other inhabitants of Nola who were accused of treason Marcellus, after defeating Hannibal, shut the gates and had a criminal inquiry held over them.

Livy, bk. 23.

[5] And the story told of Scipio Nasica tends in the same direction. It was at the time when Tiberius Gracchus, in his tribuneship, was behaving himself very oppressively towards the State by aid of profuse bribery, whereby he had ingratiated himself with the populace and was openly repeating that the Senate ought to be suppressed and the whole conduct of affairs left to the people. And, though there was a general agreement that the consul ought to use force to preserve the State, yet Mucius Scævola declared that he could effect nothing by force. Then said Scipio Nasica, "Since the consul in his regard for strict legality is letting the Roman State with all its laws be ruined, I, private citizen tho' I be, place myself at your disposal as your leader"; and raising his right hand he called out, "Let those who desire the safety of the State follow me." And at this word the better citizens shook off all diffidence and forced Gracchus and his accursed faction to suffer the punishment they deserved.

Val. Max., bk. 3,  
ch. 2. Appian,  
Civil war, bk. 1.

[6] Hence, too, Cicero praises Octavius Cæsar for taking the field against Antony of his own motion, without waiting for a decree of the Senate; for, as he said, the season for issuing decrees was not yet, and he saw that if he let the occasion slip by without warlike measures the State would be destroyed and the issue of decrees entirely prevented.

Philipp. 8.

[7] Sometimes, then, civil laws are silent in times of war and themselves disallow that regard should be paid to them, since he who would look to them may have to suffer injustice before claiming justice. And the story told of Caius Marius tends in the same direction. He had given Roman citizenship, in breach of treaty, to two cohorts of Camerians, for their admirable valor in keeping their line intact against the forces of the Cimbri, and he excused his conduct by saying that in the din of arms the words of the civil law can not make themselves heard; for the crisis was one when measures of defense were more proper than hearkening to the law.

Cicero, pro Milone.

Val. Max., bk. 5, ch. 2.

[8] And beyond doubt necessity often makes that lawful which otherwise would have been unlawful. And so when the strength of Rome had been shattered by the defeat at Cannæ, the condition of things was so critical that, at the bidding of the dictator Marcus Junius, the spoils of enemies which were fastened to the temples and consecrated to the divine will were plucked away in order to serve as instruments of war; and mere lads (*prætextati*) put on armor; and several thousands of assigned debtors (*addicti*) and men condemned on a capital charge and slaves were enrolled, for in those days they scorned to have the lowest class of citizens (*capite censi*) for soldiers. Now (as Valerius Maximus says) this, regarded in itself, is somewhat shameful, but if the stress of necessity is taken into account in estimating it, it will be seen to be a remedy suitable to the harshness of the occasion. For, as the same writer says, one must yield to fortune in cases where, if counsels which make for the greater safety are not chosen, utter ruin awaits the man who follows appearances.

c. 20, Dist. 5, de consecr., and c. 3, X, 5, 18.

Livy, bk. 23. Bk. 7, ch. 6.

So, also, when the consuls Caius Marius and Cnæus Carbo were at variance in the civil war with Sylla—a time when it was not so much victory being sought for the State as the State being the reward of victory—by virtue of a decree of the Senate the gold and silver ornaments of the temples which Numa Pompilius had dedicated to the solemn rites of the gods were melted down in order to prevent a failure of the soldiers' pay—so great was the regard paid to public honor even in this time of supreme distress. But it was not, as Valerius Maximus says, the free-will of the Senate, but thy fell hand, O most loathsome Necessity, that put the pen to that decree.

Bk. 7, ch. 6.

[9] Nor, again, is that reckoned a breach of law which is done under the stress of necessity and at the instance of public expediency. For by a law paramount, sanctioned by Jupiter, as Cicero says, every-thing that makes for the well-being of the State is just and lawful. And so, when there was urgent need that the cash in the treasury should be taken out for State use and the quæstors dared not open the treasury because they thought the law forbade, Scipio Africanus straightway demanded the keys and opened the treasury, making the law give way to

Philipp. 8.

Val. Max., bk. 3, ch. 7.  
Appian, Punic war.

expediency. And the Lacedæmonians, when driven to postpone the law to necessity, are reported to have said, "To-day let the laws go to sleep." Hence, according to some, if a sudden and unforeseen war is apprehended or some other extreme need arises, the Church is bound to make contribution.

Abb. Panormit. on c. 29 (?), X, 2, 24.

[10] Again, in what concerns the administration of a war, a general or commander of an army must, more than most, accommodate himself to times and seasons; and, if the occasion arises, the plan of a war must be altered. And at one time proper conduct calls for a certain impetuosity and ardor of soul and fierce seizure of the advantages of an opportunity, and at another time for slow-going and cautious sitting still. And as this is a difficult matter and contrary to nature, in that (as Livy says) the gods have not given everything to any one man, we must put great care and diligence into the effort to adapt our disposition to the shape of the times; and we ought not always to protract a war, after the fashion of Fabius, nor join battle lightly in our passion for fighting, after the fashion of Marcellus and Scipio and others.

[11] For Fabius, being a slow-mover by nature and not by design, earned his great renown in military matters by favour of the special occasion; for, it being impossible to defeat Hannibal in battle, inasmuch as he was of warlike disposition and rendered fierce by several victories, and as the Roman strength was worn down, Fabius broke the impetuosity of his enemy by sitting still. Yet the same man, following nature and not adapting himself to the occasion, persisted in the same attitude even after the Romans had renewed their strength, and he resisted Scipio's request to have Africa decreed to him as a province, although this was the only way to draw Hannibal out of Italy, as the event showed.

If, however, Scipio had been sent against Hannibal at the time when Fabius was sent, in all probability he would have brought the Roman fortunes even lower by his excessive lust of battle, after the fashion of Flaminius and the other predecessors of Fabius. So difficult it is to alter character and nature. And on this ground a free republic is ordinarily preferred to a monarchy in that you may find there the greatest variety of character to suit varying times.

Above, ch. 3. In another place of our journey we have shown how useless a divided command is in war.

## CHAPTER VI.

*Factions and prolonged deliberations on matters of war are very harmful, especially when what is wanted is action rather than counsel.*

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| 1. Very advantageous in deliberations that all should be of one mind. | 3. In adverse fortune the most daring plans are the safest. |
| 2. Slow and prolonged deliberations hurtful.                          | 4. The noble deed of Scipio.                                |
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[1] As in all deliberations and consultations, so especially in those relating to war, it is very advantageous that all should be of one way of thinking and not spoil good counsels by factiousness and obstinacy (which not infrequently create an extremely critical state of affairs).

And this was made clear to the citizens of Syracuse by one of the chieftains, Apollonides, after the death of Hieronymos, the Syracusan tyrant, when a very serious difference had arisen among the Syracusans, some of whom were for seeking the friendship of the Carthaginians and others of them that of the Romans, and there was a disturbance so great as to be not far short of sedition. Apollonides addressed the men of Syracuse in a speech of much ability and, having regard to the circumstances, of considerable polish, as follows:

“Never was there a city nearer either to hope of assured safety or to fear of utter destruction than this of ours at this present; for, if all would go one way together, and with one accord either incline to the Romans or to the Carthaginians, there were not a city under the cope of heaven whose state were more happy and fortunate than ours. But in case we be distracted and the common weal go divers ways, there would not be more bitter war between the Carthaginians and the Romans than between the Syracusans themselves, when within the same walls there should be banding one against another and each side have their forces, their armor, and captains of their own. And therefore we ought to endeavor our utmost that all may be of one mind. As for the question, which alliance be the more expedient, that is a matter of far too little importance to be consulted long upon.”

Livy, bk. 24.

[2] Further, just as these contentious deliberations are very hurtful, so, as a rule, are slow and prolonged ones, especially in war, where we read more than once that counsel, which otherwise and in itself is a safe and beneficial thing, has proved rash and disastrous by reason of the delay. And the men of Lavinium furnished a proof of the truth of

this. After wasting a deal of time in deliberation, they only began to send help after the Latins had been defeated, and, just as their foremost ensigns and van were issuing from the gates, up comes a messenger with the news of the defeat of the Latins. Thereupon they faced about and went back into their city: and it is said that their prætor, Milonius, remarked: "There will be a big fare to pay to the Romans for a very short journey." Now the Lavinians might either, by keeping quiet, have retained the friendship of the Romans or, by sending help to the Latins betimes, have rendered their joint forces superior to the Romans.

Livy, bk. 8.

And a further illustration is afforded by what the Latin prætor Annius said, at a time when the Latins were considering about a defection from the Romans and the Romans had in consequence summoned ten of their leading men to Rome and a discussion was taking place about the proper answer to be given in the matters which they believed would be put before them at Rome. "Although I myself," said he, "have moved you to resolve upon an answer, yet I think it concerneth us more in our main estate to determine what to do than what to say. And when we have resolved what course to take, an easy matter will it be to frame words fit for the purpose."

Livy, bk. 8.

[3] There is, therefore, no room for delay (as Tacitus says) in a plan which can only be justified by success; and (as Livy says) in difficult and critical situations the boldest counsels are the safest, seeing that the least hesitation in seizing on the opportune moment, as it flies by, means that you will seek for it in vain thereafter. Caius Cæsar, accordingly, used to say that daring and doughty exploits were meant to be performed and not to be deliberated on.

[4] And in this connection we have the notable deed of Publius Cornelius Scipio. It was after the defeat of Cannæ, and those who had fled to Canusium had offered the supreme command to the military tribunes Appius Claudius Pulcher and Publius Cornelius Scipio. And as they sat with some few others in counsel together about the management of their main affairs, Publius Philus, whose father had been a consul, gave them to understand that all their consultations were in vain, that they did but cherish a foolish hope, and that the condition of the State was desperate; also that certain young noblemen, of whom Lucius Cæcilius Metellus was the principal, minded nothing else but to take to the sea and forsake Italy and fly for succor to some king or other. This evil tidings put them all in a state of consternation and they that were there present laid their heads together and thought good to call others to counsel on the point; and then Scipio, a young man predestined to be the fatal captain of this war, said, "It is no time now to sit consulting, but to proceed to action and to do some exploit. As many therefore as are ready to save the commonweal, take arms and go with me forthwith, for nowhere are our enemies, to say the truth, encamped against us more

than where such designs are being deliberated on." Forth he went with a few following after him to the lodging of Metellus; and, finding there the young men aforesaid, close together in counsel thereabout, he drew his sword and brandished it naked above their heads as they sat in consultation. "I swear before you all," quoth he, "and from my very heart, that I will neither forsake the commonweal nor suffer any citizen else of Rome to abandon her. And if I fail in my word, witting and willing, then confound me, O Jupiter most good, most great, and bring a shameful end upon my house, my family, and all that I have. Swear thou, Lucius Cæcilius, after me as I have done, I advise thee, and ye all that are here present take the same oath; for whosoever shall refuse, know he assuredly that upon him I have drawn this sword." Hereat, they being no less terrified than if they had seen the conqueror himself, Hannibal, took the oath every one and yielded themselves unto Scipio to be kept in ward to serve against Hannibal. Beyond doubt, this deed brought Scipio greater glory than all the triumphs which he subsequently won. Livy, bk. 22.

And thus slow-moving (as Tacitus says) is not wanted when it is more harmful to lie quiet than to be daring, and this is preëminently the case in civil discords and rebellions, where nothing conduces to safety more than swift action, and there is more need of acts than of counsels, seeing that (as Cicero said when urging the prompt adoption of warlike measures against Antony) every evil can easily be checked in its inception, while it generally gets stronger as it gets older. Philipp. 5.

Accordingly, when the Gauls were planning active hostility once more, Cæsar, by dint of forced marches, made sudden onslaughts on the conspirators in all quarters, and allowed no city any leisure to think more about the safety of any other city than about its own, and by this rapidity he kept in their allegiance those who were faithful and frightened those who were hesitating whether to accept his terms of peace, and put down the attempts of the Gauls with complete ease.

Caesar, Gallic war,  
bk. 8.

And so, as the proverb goes, we ought to get to know the times, so as to avoid what usually happens in ill-starred schemes, namely, that the best course proves to be one which it is now too late to take and the fit time for action is allowed to go by in futile delays.

## CHAPTER VII.

*So long as their strength remains unbroken, the king and State should not admit the slightest derogation from their sovereignty; and those err who think that the pride of an enemy can be tamed by moderation and patience.*

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| <ol style="list-style-type: none"> <li>1. If once the sovereignty of kings begins to totter, it is easily overthrown.</li> <li>2. Concessions ought not to be lightly made to an enemy.</li> <li>3. It is better to surrender a kingdom after defeat in war than without a struggle.</li> <li>4. Patience and moderation only make an enemy fiercer.</li> </ol> | <ol style="list-style-type: none"> <li>5. Evils should be faced in due time.</li> <li>6. The fable of the dog.</li> <li>7. There should be no giving in to the evil designs of an enemy through fear of war.</li> <li>8. The fable of the wolf, the shepherds and the dogs.</li> </ol> |
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[1] There is nothing more entirely true than what Scipio Africanus said to Antiochus when warning him not to reject the terms of peace which he was offering, i. e., that royal majesty is with greater difficulty drawn down from the summits to a middle position than it is hurled from a middle position to the depths.

Livy, bk. 37.

[2] And so, as long as their strength is still unbroken, kings and States should be very chary of allowing any encroachment on their sovereignty, for their main affairs would at the same time be thereby endangered, those to whom the concession has been made being emboldened to ask for more, their own men being rendered less ready to defend them, and they themselves falling into general contempt.

[3] It is, accordingly, more conducive to their good fortune and more consistent with the dignity which is a brave man's due to endure all the chances of war, so long as there is any hope left in arms, rather than by concessions here and concessions there to lose everything without a struggle. It is better to suffer defeat in the main object of the war, after resort, though in vain, to every kind of effort, than to make a concession through fear of war.

Livy, bk. 34.

[4] For, as Livy says, the aim of war and peace is to produce a general agreement. And there is no baser act than to surrender a kingdom without fighting, nor more glorious act than to hazard everything in defense of dignity and sovereignty—and all the more so because it is a provision of nature that we generally only make people fiercer against us when we think to overcome their arrogance with patience and lowliness.

This is well shown by the following case of the Latins. They and the Campanians were making war on the Samnites; and envoys, sent by the Samnites to Rome, complained in the Senate that they, though now confederate with Rome, were subject to the same hardships as they had suffered when enemies; and they solicited, with the humblest entreaties, that they would by their sovereign authority keep the Latins and Campanians out of the Samnite territory, if these people really were under Roman dominion, but, if otherwise, that they might employ force to restrain them. To this an equivocal answer was given, because it was mortifying for the Romans to acknowledge that the Latins were not now in their power and they were afraid that, by finding fault, they might alienate them from their side. The case of the Campanians, they said, was different, they having come under Roman protection by surrender and not by treaty; so the Campanians, whether they wished it or not, should remain quiet. But there was nothing in the treaty with the Latins to restrain them from going to war with whomsoever they pleased.

This answer (says Livy) sent the Samnites away uncertain as to Bk. 8. the conduct which they were to think the Romans would pursue and it also further estranged the Campanians through fear, while it rendered the Latins more presumptuous, they thinking that there was nothing which the Romans would now refuse them. Accordingly, their leading men summoned frequent meetings under the pretext of preparing for war against the Samnites, but in all their deliberations among themselves they fomented a plan for war with Rome. And hereupon their prætor Annius inflamed them with the following harangue:

“ If ye ever wished to see the day wherein ye might participate in government and recover your liberties again, lo that time is now come, presented unto you by your own valor and the gracious goodness of the immortal gods. Tried their patience ye have in denying soldiers! Who doubteth but that they were in a great choler when we brake a custom of more than two hundred years’ prescription? Yet, nevertheless, this grief have they put by. We warred upon the Pelignians in our own name and quarrel, and they who aforetime allowed not us the liberty so much as to defend our own marches of ourselves, nothing gainsaid. That the Sidicines were taken to our mercy and protection, that the Campanians revolted from them and sided with us, that we levied an army against the Samnites their confederates, they heard and knew well enough; and yet they stirred not forth once from their city. How come they to be so calm and quiet, but upon a knowledge of our puissance and their own weakness? ”

And in this way the Romans entered on a war of uncertain result with the Latins, a war all the more grievous to them because due to the excessive patience which they had used in the hope of avoiding it;

whereas, if they had withstood the earliest attempts of the Latins, they would have had little trouble in keeping them in their duty. The Roman forbearance did not avoid the war but only put it off, to the great advantage of the Latins, to a time when the enemy's preparations for war were more complete.

[5] Plans for the future should, then, be thought out beforehand and the best line of conduct be determined on in advance, for any contingency that may arise of either kind; and this ought to be faced before it happens, instead of waiting until you are overwhelmed and the ill grows day by day and gets past cure. This is also a maxim of doctors in the treatment of disease. And so Regulus, when in Gaul, addressing Commanus, King of the Segoregii, insisted that Marseilles (which Senanus, the predecessor of Commanus, had allowed the Greeks to found) would soon or late cause the ruin of the neighboring peoples, and he urged that it ought, then, to be checked in its beginning, lest when it had increased in strength it should overthrow him himself.

[6] And he added this fable: "A pregnant bitch once begged a temporary lodging from a shepherd in which to bring forth her young; and then, after having obtained this, made a second request for permission to bring up her puppies there; and in the end, being installed as guardian of the house, she claimed the ownership of the place." Just in that way, said he, the men of Marseilles, now wearing the guise of tenants, will in time become proprietors of those parts.

Justin, bk. 43.

If, then, war is apprehended, it is better to attack the enemy before he is ready than, merely in order to avoid a war at the present time, to lay up for oneself a much bitterer war for some future date.

[7] For there should never be any giving in to the evil designs of an enemy through fear of war; so to do is not so much a method of avoiding war as of putting it off to a much more inconvenient season, and you may be sure that often by a posture of war you will be more likely to have peace than by putting your arms on one side and making concessions to the arrogant demands of the enemy, an attitude which rather stimulates and feeds the ferocity of the enemy than appeases it.

Philipp. 7.

And this was what prompted Cicero's speech, in which he urged the Senate not to make peace with Antony: "By the immortal gods, O conscript fathers, do not, in your hope for a present peace, lose a permanent one." The Romans, accordingly, acted wisely, when Philip and Antiochus were concocting a war, in being the first to take warlike action, and they preferred to shift the war into Greece rather than wait for it in Italy. This is what Vegetius meant when he said, "Let him who wants peace prepare war," and what Manlius Capitolinus used to say, "Just show war and you will get peace: let them see you prepared for blows and they will admit your claim."

For (as Cicero said) salutary severity outdoes a futile show of clemency. If, however, we persist in being clement we shall never lack civil wars. And, as the same writer says in another place, when dealing with civil war: Peace ought not to be granted to an enemy save when he sues for it with arms laid down, but if he sues for it while still fighting he must get his peace by a victory and not by a bargain. This, too, is the drift of Mimus' remark: "It is humane to pardon when the man pardoned is ashamed, but in other cases, by putting up with an old wrong you invite a new one." Epist., bk. 10.

And here we have, I think, the explanation of the fable which was propounded by Demosthenes. It was at a time when Alexander the Great, under the cloak of liberty, had invaded a great part of Greece and was besieging Athens, making out that his conduct was not meant to deprive them of liberty or reduce the city to slavery, but was due to the incessant revilings with which he was assailed by ten insensate citizens of theirs; and declaring that directly these few were surrendered to him he would quit the siege and release the people from war and hunger; but before all he demanded the surrender of Demosthenes and nine other highly distinguished citizens. And the Senate was hesitating and many were calling out that the interests of the many should be considered before those of the few, and those few who were demanded for punishment were in considerable fear and hardly dared to speak because all the others were hoping to gain peace and liberty through their destruction.

[8] And their surrender would have been decided on, had not Demosthenes disclosed the King's crafty snares in the following fable: "Once on a time," said he, "a wolf persuaded some shepherds whose diligence he wanted to elude, to form a friendship with him on terms that his enemies the dogs, who were the cause of their hostility to one another, should be handed over as hostages. The shepherds hearken to him, and the dogs, in conformity with the terms of peace, are handed over, though they had been the most diligent guardians of the sheep. And then the wolf, putting fear aside, tears and devours the whole flock till his lust is satiate and mangles the shepherds, too. This," said Demosthenes, "O men of Athens, is what Alexander is now doing, demanding, as he does, the surrender of all those whose speeches are aimed against his schemes and who lay open his snares, so that when the city is deprived of its guardians he may the more easily attack and plunder it." Plutarch, Life of Demosth.

## CHAPTER VIII.

*Whether it is better to await war at home or to carry it into the enemy's territory.*

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| <ol style="list-style-type: none"> <li>1. Scipio's opinion.</li> <li>2. The opinion of Quintus Fabius Maximus.</li> <li>3. The Athenians more successful in war at home than abroad.</li> <li>4. The fable about Antæus.</li> <li>5. A courageous aspect a great advantage to the fatherland.</li> <li>6. Although Agathocles could not withstand a siege at home, he nevertheless carried the war into Africa.</li> </ol> | <ol style="list-style-type: none"> <li>7. The plan of Hannibal.</li> <li>8. The opinion of Agis.</li> <li>9. The advice given to the Romans by Hiero, King of Syracuse.</li> <li>10. War abroad to be conducted in one way, war at home in another.</li> <li>11. The soldiery better at a distance from their homes.</li> <li>12. The useful example of Fabius.</li> </ol> |
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This question has been very variously discussed by generals of the highest renown, and many arguments and examples have been cited on either side, so that it is not easy to say which opinion ought to be followed.

[1] And there was once a keen contention on this matter between Quintus Fabius Maximus and Publius Scipio; the latter sought the allotment of Africa to himself as a province, asserting that the war with Hannibal would not be brought to an end save by carrying an army over into Africa and thereby diverting the war from Italy; and he pointed out the effect of striking fear, of one's own initiative, into the enemy and of putting another into peril and removing danger from oneself; and he used for this the example of Hannibal himself. He pointed out, too, the great difference between seeing the territory of another ravaged and of seeing your own overrun by fire and sword, and how much more courage a man has who is causing danger than one who is warding it off. And (he continued) it would be consistent with the dignity of the Roman people, and the high reputation they enjoy with foreign kings and peoples, to appear to have had spirit not only to defend Italy, but also to carry hostilities into Africa. Let the Roman camp (said he) dominate the gates of Carthage rather than that we Romans should again behold the rampart of the enemy from our walls; let Africa be the seat of the rest of the war; let terror and flight and the laying-waste of lands and the defection of allies and the other disasters of war be diverted thither.

[2] Fabius, however, maintained the contrary, holding that Hannibal ought first to be driven out of Italy in a straightforward way rather than be drawn into Africa by roundabout methods. This, said he, is

naturally the first object, to defend your own possessions, and after that you can proceed to attack those of others. Let the object be peace in Italy, not war in Africa; let us be free from fear ourselves before we bring it upon others, and that, too, in a quarter where there are no harbors open to the Roman fleets, no allied city, no friendly king, no room anywhere either to take up a position or to advance, but whichever way one turns one's eyes, all is hostility and danger. The Carthaginians will defend the walls of their capital, the temples of their gods, their altars and their hearths in other sort than they defended Spain. Where Hannibal is, there is the head and bulwark of the war, and if he be drawn over into Africa, he will only be rendered more powerful in arms and men by the nearness of Carthage and the friendliness of all Africa.

Livy, bk. 23.

[3] Now on Fabius' side there is, too, the example of the Athenians; for so long as they carried on war at home they always came off conquerors, but when they despatched a great fleet into Sicily they plunged their flourishing State into lasting ruin, as the result of one naval battle.

[4] And what is told of Antæus, King of Lybia, also makes for Fabius' view, for he was invincible to the Egyptian Hercules so long as he waged war in his own dominions, but when Hercules had craftily lured him outside he was struck down and lost both life and kingdom. And this gave rise to the story that Antæus, being the son of the Earth by Neptune and second to none in strength and bravery, as often as his limbs were weary received fresh strength at the touch of his mother Earth, and so Hercules, when fighting with him, grasped him by the middle and lifted him up from the earth, not being able in any other way to master him, and forced him to yield up his life thus clasped to his bosom.

Lucan, Civil war, bk. 4.

Thomyris, too, queen of the Scythians, no whit frightened by the approach of Cyrus, preferred to conceal his approach rather than go to meet him, thinking that the issue of the fight would be more favorable to herself if it took place within the boundaries of her realm; and there, after luring Cyrus into a narrow defile, she ambushed and slew him with two hundred thousand Persians.

Justin, bk. 1.

So, too, when the Lacedæmonians once were waging other wars against some neighboring peoples, the Thebans, under the leadership of Epaminondas, conceived the hope of seizing their city and silently set off for Lacedæmon; but no more than a hundred Spartans, worn out with age, who had remained at home, offered battle to the fifteen thousand Theban soldiers.

[5] Such courage and strength does the sight of one's fatherland and household gods afford, and so much more do things that are present (says Justin) draw out the finer qualities of men than things that are a mere remembrance; for the Spartans had before their very eyes the

Bk. 6.

interests and persons that were at stake and this gave them resolution either to conquer or to die.

This, too, was the meaning of the advice which Titus Quinctius Flaminius gave the Greeks when they were compassing a war on Zacynthos: "Not like a tortoise (which is safe against all blows so long as it stays in its shell, but if it protrudes any part is open to attack and defenseless in the exposed member) to expose themselves to danger by sticking their heads out of the Peloponnese."

Livy, bk. 36.  
Plut., Apoph.

On Scipio's side in the argument, however, is the result of that very war, in which he overcame Hannibal (who had carried on the war in Italy for thirteen years scatheless); for he first lured him into Africa, and then gained a glorious victory over him.

[6] In the same way, when the Carthaginians had drawn the line of siege round Syracuse and the tyrant Agathocles saw that he was not of sufficient strength or well enough equipped to sustain a siege, he straightway, with admirable boldness (it being as if one who could not defend his own things were to attack another's), carried the war into Africa and pitched his camp at the fifth stone from Carthage; and, after overcoming Hanno, the Carthaginian general, and ravaging Africa, he seduced numerous splendid towns, which weighed the obligations of friendship by reference not to good faith but to success, to defect from the Carthaginians to himself.

Justin, bk. 22.

[7] Another thing on Scipio's side is the plan which Hannibal proposed to Antiochus after he himself had spent thirteen years in Italy carrying on war with the greatest glory. Antiochus was turning over the question of a war with Rome, and Hannibal suggested that he should make Italy his field of operations, seeing that Italy would supply both soldiers and provisions to an outside enemy and that in Italy the Romans could be beaten by their own resources and strength and arms, while if no action took place in Italy the Roman people would be able to carry on war outside Italy with all the strength and supplies of Italy and no king or people would be the equal of the Romans.

Livy, bk. 34.

[8] This, too, was the view taken by Agis, King of the Lacedæmonians, who urged that the war against the Ætolians should be carried into their own territory and that they should not be permitted to enter the barriers of the Peloponnese.

Plutarch,  
Life of Agis.

[9] And after the slaughter of Caius Flaminius and the Roman army at Thrasymenus, the same advice was given to the Roman people by Hiero, King of the Syracusans, who was friendly to the Romans, i. e., that the consul to whom Sicily had been assigned as a province should send his fleet into Africa, so that the enemy might have war in their own land and have no respite for the despatch of reinforcements to Hannibal.

Livy, bk. 22.

On this plan, too, the people and senate of Rome declared the Macedonian war on the proposal of the consul Servius Sulpitius, to

whom Macedonia had been assigned as a province. He persuaded the people to ordain the declaration of the Macedonian war by the following reason: that it was no question whether the Romans should have war or peace (for Philip, who was projecting a vast war by sea and land, would not allow them that choice), but whether they should send their legions into Macedonia or await the enemy in Italy. How great the difference between these two courses was, they had found out (said he) in the last Punic War; for who doubts that if, when the besieged Saguntines implored aid from the Romans in reliance on their good faith, the Romans had sent it without demur—as their ancestors had done to the Mamertini—they would have succeeded in diverting the whole of the war into Spain? By their dilatory measures, however, the Romans laid up for themselves a great defeat in Italy. And it is unquestionable that if, at the time when Philip had bound himself to Hannibal, by envoys and letters, to make an expedition into Italy, Levinus had been sent with his fleet to carry on war with Philip up in Macedonia, Philip would have been held in check and Italy would have continued in greater prosperity and its strength less impaired. And many commanders and armies would have been spared to it, which the Punic War subsequently destroyed, when Pyrrhus attacked and shook it and advanced victorious almost to Rome itself, and not the Tarentines only, and that tract of Italy which is called *Magna Græcia*, revolted from the Romans, but the Lucanians also and the Bruttians and the Samnites, who were all induced by Philip's project of coming over into Italy to remain just about as quiet and faithful as they did during the Punic War! Why, if the Romans had then demurred to crossing over into Africa they would even now (continued Sulpitius) have Hannibal in Italy and be at war with Carthage. Let Macedonia rather than Italy be the seat of war. Let the cities and lands of the enemy be wasted with fire and sword. We have already found by experience that our arms are more potent and successful abroad than at home.

Livy, bk. 31.

[10, 11] This discourse lends support to the saying of Agathocles, that war is to be conducted one way abroad and another way at home. At home the only aid is that furnished by the resources of one's own country, while abroad the enemy must be conquered by means of his own resources. Add to this, that a soldier is better at a distance from his home, for he has no available shelter and can not evade the necessity of fighting. It was on that principle that Hannibal, when campaigning in Spain, garrisoned Africa with Spaniards and sent for reserves from Africa to enable him to do this. And a soldier will fight all the more boldly and bravely on hostile soil, in proportion as there is more hope and courage in taking the offensive than in taking the defensive. Moreover, if you have overcome your enemy outside his own territory, he can easily repair his losses and protect his own soil, while if you beat him in

Livy, bk. 10.

his home, so that he has no opportunity to recruit his strength, you will easily overcome him and dictate an end of the war. And Hannibal would not have found this difficult after his victory at Cannæ, had he made proper use of his victory and of fortune's smiles, for it is quite clear that it was only his dilatoriness that saved the city and empire of

Livy, bk. 22 Rome.

Now after putting forward these arguments and illustrations we leave every one a free choice in forming his opinion thereon. Yet, whenever there is a question about the relative advantages of making or awaiting war, repeated scrutiny must be addressed to the points whether the enemy's territory is easy of approach, whether it is fortified, whether it is level or mountainous (so that ambushes may be suspected), and whether you have to do with an enemy who is armed and warlike or with one who is unarmed and unwarlike and whose strength is in his purse. For the latter kind of enemy can easily be crushed in his home by means of his own resources, as in the case of the Carthaginians, but it is quite a different thing when you have to do with an armed, bellicose enemy, well-equipped at home for war, such as the Romans were.

[12] If, however, you have to meet on your own soil a warlike enemy who is accustomed to victory, it will be well to follow the example of Fabius: for he saw that it was no easy matter to beat Hannibal in battle, he being flushed with several victories, and so he adopted the policy of sitting still, whereby he broke Hannibal, and he gave Hannibal no chance of a victory, in order that he might be conquered by others, deeming that he had gone quite quick enough in the direction of victory if he had prevented Hannibal from winning one. By adopting that policy he retrieved the fortunes of Rome when brought low by many disasters.

A very notable description of this policy is contained in the words which that same Fabius addressed to Lucius Æmilius Paulus when moving out against Hannibal. They are as follows:

"The only way to war against Hannibal is that which I took and always used. Neither is it the issue and event alone (for that is teacher of fools) which shows this unto us, but even reason itself, which hath been and will still be the same and immutable, as long as things in the world hold on as they do. We war (you see) in Italy, at home, in our own ground and place of residence—all quarters round about us full of our own citizens or friendly allies, who daily help us and will be ready still to furnish us with armor, men, horse, and victuals. Sufficient proof of their faithfulness have they given us already in our hard distress. Space and process of time make us better and wiser every day than another, and more resolute. Contrariwise, Hannibal is in a strange and foreign land, in his enemy's country, in the midst of all things that are cross and adverse to him, far from his house and home, far from his native soil,

having peace nowhere, neither by land nor sea. No cities receive him, no walls he hath, nothing sees he, wheresoever he goes, that he can say is his own. He lives from day to day upon rapine. Scarce a third part has he of those forces which he transported over the river Ebro. Hunger has wasted more of them than the edge of the sword. And for this small remainder that is left he is scant provided of food. Do you make any doubt, then, that we shall vanquish him by sitting still, who day by day waxes old and feeble, who neither has store of victuals, nor reserves of men nor money? ”

Livy, bk. 22.

And it is, in truth, admitted that Hannibal was at that time brought to such a pass that he could have been defeated without any trouble, had not the rashness of Terentius Varro given the enemy the opportunity of success. On the same principle the dictator Cnæus Sulpitius dragged out the war in Italy against the Gauls. He was reluctant to run any risks against an enemy whom time and place were weakening every day, and who was lingering on without provision of supplies and without adequate defenses. Moreover, he knew that a little delay enfeebles those souls and bodies who derive all their strength from attack.

Livy, bk. 7.

## CHAPTER IX.

*Whether it is better at the beginning of a battle to make for the enemy with much din and a vehement charge or on the other hand to hold one's ground and await the enemy's attack.*

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. Trifles sometimes very important in war.</li> <li>2. The Samnites and Gauls fierce in onslaught.</li> <li>3. Fabius sustained the attack of the enemy and carried the day.</li> <li>4. Decius attacked the enemy and was defeated.</li> <li>5. Titus Veturius followed the example of Fabius.</li> </ol> | <ol style="list-style-type: none"> <li>6. The dictator Aulus Cornelius Cossus was successful with his waiting tactics.</li> <li>7. Cæsar decried Pompey's tactics in ordering his men to await Cæsar's attack.</li> <li>8. The custom of the Gauls and Germans at the beginning of a battle.</li> <li>9. The Syrians drew an augury as to future victory or defeat from the din made.</li> <li>10. The tactics of Cyrus.</li> </ol> |
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[1, 2] Nothing is so trifling that it may not sometimes produce great results in war. What happened to the consuls Quintus Fabius and Publius Decius in the war against the Samnites shows us this. They had so marshalled their line that Fabius was opposed to the Samnites on the right wing, and Decius to the Gauls on the left wing. The course of the fight was by no means similar on the right and the left wing, says Livy. Bk. 10. The Romans under Fabius rather repelled than offered assault and the contest was prolonged until very late in the day, for their general knew very well that both Samnites and Gauls were furious in the first onset, so that to withstand them would be enough, and that, in a protracted contest, the spirits of the Samnites gradually flagged and even the bodies of the Gauls, remarkably ill-able to bear labor and heat, became quite relaxed and, although in their first efforts they were stronger than men's, yet in their late efforts they were weaker than women's. Fabius therefore reserved the strength of his men as unimpaired as possible, until the time when the enemy were the more likely to be worsted.

[3, 4] Decius, more impetuous, as being in the prime of life and full flow of spirits, exerted whatever force he had to the utmost in the first encounter, making an attack on the enemy which did not succeed, for his troops were put to flight early in the conflict and scattered. Then, as he could not rally them, he determined to win the glory which he could not get through victory by imitating the example of his father Publius Decius and devoting himself and the legions of the enemy to the infernal gods on behalf of the army of the Roman people, the Quirites; and, wherever he saw the line of the Gauls thickest, he spurred forward

his horse and, rushing upon the enemy's weapons, met his death. And the Romans, on the loss of their general—an event which on other occasions inspires terror—stopped their flight and set about beginning the combat afresh; and, when supports reached them which, on the orders of Fabius, had been sent from the rear to support his colleague, they won the victory.

[5] And the consul Titus Veturius, when despatched against the Volscians, copied the example of Fabius. He stirred up the enemy to an engagement, they having a considerable advantage in numbers. But he did not advance his forces or allow them to return the enemy's shouts, but bade them stand still with their spears fixed in the ground and, when the enemy came to close quarters, the cohorts were then to fall to it with their swords and with their full strength. That is a very fierce kind of fighting. The Volscians, weary with running and shouting, set on the Romans as if these were quite benumbed by fear, but after they found what a vigorous resistance was being made and saw the swords glittering before their eyes, they turned their backs in great disorder, just as if they had been ambushed. Nor had they strength sufficient even for flight, because they had advanced to the battle at full speed. The Romans, on the other hand, because they had not stirred from their ground in the beginning of the action, being fresh and vigorous, easily overtook the wearied fugitives, carried their camp by assault, and after driving them thence pursued them to Velitræ, into which the conquered and the conquerors entered in a body.

Livy, bk. 2.

[6] In like manner the dictator Aulus Cornelius Cossus, just before engaging with the Volscians, who had a large army, addressed his troops as follows:

“The day, my men, is ours, if either the gods or their prophets can foretell future events. Therefore, as resolute men of assured hope and such as shall encounter with far meaner than ourselves, pitch we our javelins down at our feet and draw our swords only. Neither would I have you to charge out of the main battle, but to keep your ground, to stand steadfast, and abide the first shock of the enemy. And when they have spent their volley of shot in vain, and shall in full torrent come upon you as you stand, then let your swords glitter in their eyes, and think every man of the gods that they will help the Romans, the gods, I say, who in auspicious hour have sent us forth into the field of battle.”

The troops fought as he had charged them; the general had not duped his legions, and fortune did not dupe the general. Pompey, too, adopted this plan and, just before engaging with Cæsar at Pharsalus, bade his men await Cæsar's attack and not budge or allow their line to be broken. And this he is said to have done by the advice of Caius Triarius, that the impetuosity of the charge of Cæsar's soldiers might be checked and their line broken; and he thought that the javelins would

Livy, bk. 6.

fall with less force if the soldiers were kept in their ground than if they met them while themselves in movement; at the same time he trusted that Cæsar's soldiers, after running over double the usual ground, would be out of breath and exhausted by fatigue.

[7] Cæsar was of opinion, however, that herein Pompey acted without sufficient reason, for there is a certain impetuosity of spirit or an alacrity implanted by nature in the hearts of all men, which is inflamed by the desire to meet the foe in fight. This a general (Cæsar says) should endeavor not to repress but to increase, it not being a vain institution of men of old that the trumpets should sound on all sides and a general shout be raised, for they thought that this struck the enemy with terror and inspired their own army with courage.

Caes., Gallic  
war, bk. 3.

[8] Thus the Gauls and Germans, who were men of reckless wrath and passion, had the custom, when they were preparing to attack the enemy, of raising a wild, discordant song called *harritus*, and of shrieking and jumping about and brandishing their shields, and they used to forecast the result of the coming fight hereby.

[9] The Syrians did the same at the commencement of an attack: after an act of worship of the sun, they had their signal trumpet sounded for the joinder of battle, and then they raised a most excited shout in order to inflame their ardor as they rushed to the onslaught and delivered their attack. If, however, the noise they gave out were harmonious and not irregular and conflicting and discordant, it would not sufficiently stimulate their courage for the battle or betoken a coming victory, for each man's determination and courage was gauged by the pitch of excitement and insistence to which he was raised by the presence of the enemy, and this afforded an unquestioned indication of the way the fortune of battle would go.

Bk. 4. And Livy mentions the same kind of thing in connection with the battle which the consul Caius Sempronius so rashly and ill-advisedly fought with the Volscians:

"The first token which way victory would incline," says he, "was the manner of shout at the first charge: which by the enemy was more loud, more shrill and continual, but by the Romans dissonant, unequal, dead and cold, often begun and often renewed: and by their uncertain and variable noise they betrayed the inward fear of their hearts."

[10] Now Cyrus' plan was the following. If the enemy attacked in a tumultuous fashion his soldiers were to receive their onslaught in silence; but if the enemy attacked in silence, his line of battle was to advance with shouts and din. It certainly makes a vast difference, however, whether you have to deal with raw soldiers, who are susceptible to the slightest unusual noise and impression or with seasoned veterans who are not usually frightened by trifles.

Alex. ab Alex.,  
Genial. dies,  
bk. 4, ch. 7.

## CHAPTER X.

*It is not prudent to attack a state which is torn by civil dissension merely in reliance on that fact.*

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| 1. Civil discord renders a State mortal which otherwise would be immortal.<br>2. Dissensions of enemies to be fomented. |  | 3. Enemies not to be attacked because of their dissensions. |
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[1] Men of old held the well-founded opinion that a great state is immortal if its citizens abstain from the madness of civil strife, for experience shows that to be the one poison and weakness which brings to ruin the greatness of flourishing states. An example of this is furnished by the Roman State, which was so long the ruler of the whole world, until its strength was worn out in civil and intestine wars and it sank to nothing.

[2] Prudent generals, accordingly, make a practice of fomenting the dissensions of their enemies whenever they have the chance, so that in this way they can overmaster the strength of their enemy by a bloodless victory. It was in pursuit of this policy that Marcius Coriolanus, in his approach to the city, when laying waste the territory of Rome, ordered the lands of the patricians to be spared so as to render them objects of suspicion to the plebeians and thus intensify the civil dissension which had already begun. And when Hannibal saw that Quintus Fabius, making war by reason and not by chance, was robbing him of victory by his astute policy of delay (which, however, brought him into contempt at Rome, where he was called timid)—in order to increase the unpopularity of Fabius, he ordered that no hostile measures were to be taken against his estate, although the property all round it was leveled with the ground, so that this might seem to be a price agreed on in some secret arrangement. And Fabius, in order to avoid this unpopularity, is said to have sold that estate and to have devoted the proceeds to the ransom of prisoners. Herein he imitated Pericles, for the Spartans ordered his estate to be exempted from the general devastation, in the hope that he would either fall into danger by unpopularity or into infamy by the suspicion of treachery; but Pericles had anticipated their intentions and foretold them to the people, and in order to turn aside the attacks of malice he had presented these very properties to the State. Thus the danger in which he had been placed was turned into the greatest glory.

Livy, bk. 1.  
Dion. Halic., bk. 8.

Livy, bk. 22.

Justin, bk. 3.

[3] Further, it would not be a well-advised policy to attack an enemy in reliance merely upon his internal dissensions, for (in Livy's words) pressure from without is the best cement of concord within. And so it befell when the Prænestines imagined that the dissensions of the Romans were providing them with an excellent opportunity. They made a hasty march, laying waste the country as they went along, and advanced their standards as far as the Colline gate. The panic in the city was great: the alarm was given to take up arms: people ran together to the walls and gates. But in the end they turned from their dissensions with one another to war and appointed Titus Quinctius Cincinnatus dictator. And when this got abroad (so great was the terror of that office) the enemy retired from the walls and the younger Romans assembled to the edict without demur. For terror from without represses civil discords.

Livy, bk. 6.

And so when Cæsar was campaigning against Britain, the Britons unanimously conceded full powers and the conduct of the war to Cassivellaunus, although previously perpetual wars had taken place between him and the other States; but Cæsar's arrival so alarmed them that they intrusted him with the whole war and command.

Caes., Gallic war, bk. 5.

In the same way during the war with Veii, in the consulship of Cnæus Manlius and Marcus Fabius, the minds of the soldiery were so embittered by domestic dissensions that the consuls abode in their camp and did not venture to hazard a battle, for they could not trust their men with arms; and the enemy, in reliance on this, tried in every possible way to worry the Romans into a fight by indignities and insults. The Romans at last could not endure the shame any longer and the competition between external and internal hatred ended in favor of the former, so disdainful and insolent was the mockery of the foe. And so the soldiers formed in battle line, enraged against the enemy and reconciled to each other, and Livy says that the Romans never joined battle in any previous war with bitterer hostility; while, had the enemy restrained themselves, they could quite easily have conquered the Romans with their own strength and soldiery.

Bk. 2.

The Æquians and Volscians furnish another example. They had made a joint incursion into Roman territory, and then a dispute arose whether the Æquians or the Volscians should supply a leader of that force, and out of that dispute a fierce dissension sprang and a fight took place in which the enemy wrought havoc on each other in a deadly and obstinate manner, so that they allowed the Romans to carry off the victory.

Livy, bk. 2.

Dion. Halic., bk. 8.

And so when Scotio, the Dacian commander, learned that the Roman people were torn by civil strife, he did not think this an opportunity which ought to be seized on for harassing them, for he perceived that an external war is often the means of extinguishing an intestine war;

and he repressed and restrained his men's ardor for a fight in a neat manner, by instituting a comparison with two dogs which he brought before their eyes and then, when these dogs had been fighting with each other for a little while, he introduced a wolf and at once the dogs dropped their anger against each other and keenly attacked and put an end to their common foe.

Cœl. Rhodig., dig.  
lect. antiq., bk. 9,  
ch. 50.

## CHAPTER XI.

*Troops to be so placed, by all possible endeavors, that fighting is an absolute necessity for them; but the enemy should be afforded an escape from that necessity.*

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| <ul style="list-style-type: none"> <li>1. The force of necessity.</li> <li>2. The soldiery to be compelled of necessity to fight.</li> <li>3. The opportunity of flight to be taken away from the soldiery, so far as possible.</li> </ul> | <ul style="list-style-type: none"> <li>4. The enemy to be afforded opportunities to avoid the necessity of fighting.</li> <li>5. The enemy to be provided with an avenue of escape by flight.</li> </ul> |
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[1] How great the force of necessity is has been sufficiently discussed by the philosophers, for they hold that all things are ordained by Necessity. And so when Thales was asked what was the strongest thing, he replied, "Necessity, for it alone can not be overcome."

[2] And the most noted generals, by reason of their perception of its force and inherent virtue and in view of its great effectiveness in all departments, and especially in war, and of the access of courage which it produces, make a practice of carefully insuring that their soldiery may be driven by necessity to fight: for, as Quintus Curtius said, necessity comes before reason, especially in war.

So, too, the dictator, Quintus Fabius, after keeping his men within the rampart for several days after a drawn battle with the Samnites, like one besieged rather than a besieger, suddenly displayed the signal for battle. He judged it the more efficacious method of inflaming the courage of brave men to let none have any room for hope but in himself, and so he kept secret from the troops the arrival of the master of the horse and a new army; and, as if there were no safety but in fighting their way out, he made a speech pointing out to the troops the confined nature of the situation and the dearth of supplies, and said that there was no way out for them except what a victory would open. He then ordered the camp to be burned lest they should retreat thither, as on the former day, without completing their victory, saying that fortifications ought to be secured by arms, not arms by fortifications. Then the soldiers advanced against the enemy with spirits roused by the dictator's address, which seemed to indicate the extremity of need; and the very sight of the camp in flames behind them was no small incitement to victory.

Livy, bk. 9.

And so also when Marcus Porcius Cato was campaigning in Spain, he marched his army round to a place at some distance from his ships and camp, where their only hope would be in their own valor, and he

joined battle in the very center of the enemy, addressing his soldiery as follows. "Men," quoth he, "there is no other hope now left but in clean strength and valor, and I of very purpose have wrought it so. Between us and our camp the enemies are encamped all; behind at our back we have our enemy's land. The bravest courses are ever safest, namely to build and ground our hope surely in valor."

Livy, bk 34.

And after Hannibal's passage of the Alps, when he was on the eve of a battle with Scipio, he showed his men the absolute necessity of fighting, in the following speech:

"On both hands, right and left, inclosed we are by two seas, and we have not so much as one ship to escape away in. Before you, near at hand, is the Po, a greater river and more violent than the Rhone; behind you, to hem you in, are the Alps, which you hardly passed over when in heart and lusty. Here, men, you must either get victory or lose your lives, even where you first encountered the enemy; and the same fortune which has laid upon you the necessity of fight proffers unto you (if you go away with victory) such rewards as men use not to wish for greater and more honorable at the hands of the immortal gods. The Romans have sent over this year already two consuls, one into Africa and the other into Spain; nothing have they left for us but that which we can win and hold at the sword's point. Well may they be timid and idle, having a place of refuge to retire into, who in their own country and ground may be received when they take to their heels through safe and peaceful paths to save themselves. But as for you, it stands you upon to play the men and to make account of no middle designs between victory and death, but, upon certain despair of all shifts besides, either to obtain victory or, if fortune shall fail us, choose rather to die fighting than to be killed flying. If this be settled and deeply resolved in your hearts, I will say once again, The day is yours."

No sharper spur to conquest, says Livy, has been given to men by the immortal gods. And so when the Volscian general, Vectius Messius, saw that his troops were hemmed in by the Romans on all sides, he shouted out to them with a penetrating voice:

Bk. 21.

"What, will ye here, without making your defense, without revenge, offer yourselves to be devoured of the enemy's sword? What do you, then, with weapons? Why began ye war first? Are you troublesome and unruly in peace and cowards in war? What hope have ye in standing still? Do you look for some god to protect and deliver you? You must make way by dint of sword. Come, then, and that way where ye shall see me go afore follow ye after and stick to it like men, as many of you as mind to see again your home, your parents, your wives and children. It is neither wall nor trench, but armed men that must withstand armed men. In valor ye are their matches, but in necessity (which is the last and strongest engine of all other) ye are the better."

Livy, bk. 4.

[3] Further, just as the most noted generals would so place their troops that fighting was an absolute necessity, so they would employ various methods to take away from them the chance of flight. Thus Cæsar, before engaging in battle with the Helvetii, first removed his horses from his own sight and then from the sight of everybody, and harangued his troops, pointing out that all were now in equal danger and urging them to put away all hope of flight; and this was a common custom with the Helvetii. When the tyrant Agathocles crossed into Africa, he had all his ships burned with the assent of his troops, so that all might know that they had nothing to hope for from flight and must therefore either conquer or die. When Astyages, King of the Medes, was fighting with Cyrus and the Persians, he posted part of his troops in the rear and bade them put fugitives to the sword, just like enemies, and had a proclamation made to his men that, if they did not conquer, they would find just as strong men behind their backs as in front of them, and so his troops derived from this necessity a large accession of courage. And the Romans not infrequently had their fugitives put to death just as if they were enemies.

Caes., *Gallie war*, bk. 1.

Justin, bk. 22.

Justin, bk. 1.

And very often great advantage accrued from the wholesome device which we read of as much resorted to by the Romans in times of great alarm, and of severe stress and despair: namely, to post squads of cavalry in front of the fortifications with orders to treat as enemies those who were sufficiently ill-advised to flee from the battle back to the camp, and to attack them with swords drawn, so that they should see a hostile array behind them as well as in front. This final counsel of despair at times so inflames the courage of soldiers as to restore lines that have yielded and been scattered in disgraceful flight, so that the troops, under the coercion of a twofold fear, have not seldom snatched victory out of the hands of the enemy.

[4] That same principle, however, which suggests the expediency of throwing on troops the absolute necessity of fighting, demonstrates the expediency of removing this necessity from the enemy; for it often happens that despair turns into valor, as in Virgil's line,

*Una salus victis nullam sperare salutem.*

(The sole safety of the conquered is to abandon all hope of safety.)

And so in the war with Veii, the enemy at one time set off to storm the Roman camp with troops withdrawn from the fighting line: and thereupon the consul Cnæus Manlius rode back to the camp and posted troops at every gate in order to bar the retreat of the enemy; but the despair thus created rendered the enemy rather mad than bold, so that the consul was killed and their onset could not be any longer withstood, and matters would have reached the worst extreme if the legates had not opened a way for the enemy to escape by one gate. And so the

Livy, bk. 2.  
Dion Halic., bk. 9.

opinion of Scipio has been deservedly praised, i. e., that a way for the enemy to escape by should always be provided.

[5] For (as Tacitus says) the more hope the mind cherishes the less inclined will it be to offer resistance, seeing that necessity gives an edge even to cowardice, and despair is often the parent of hope or, at any rate, is a great incitement to an honorable death. And so when the Greeks were eager to prevent the crossing of Xerxes after his defeat in battle and to cut off the King with his army, Themistocles, fearing that his enemy, if thus cut off, would turn their despair into a virtue and would hew with the sword a way which would not be open to them otherwise, acted with much wisdom, when he found himself unable to bring the others to his view, in sending a slave to Xerxes with the warning to effect a crossing by a timely flight.

Justin, bk. 2.

And the conduct of the dictator Marcus Furius Camillus, at the siege of Veii, was also shrewd. A mine had been driven through the citadel of Veii through which he had sent picked soldiers and had filled the city with his soldiers, and there was general fighting; then a great slaughter took place whereby he facilitated the capture of the town, and, when the ardor of the fight had abated, the dictator ordered the heralds to proclaim that the unarmed should be spared. In this way an end was put to bloodshed and, laying down their arms, the enemy began to surrender.

Livy, bk. 5.

The same thing happened when the colony of Fregellæ was occupied by the Samnites after a sudden surprise in the night. The Fregellans contrived to maintain the battle for a considerable time without loss of ground, both because they fought for their religion and liberty and because the multitude unfit to bear arms assisted them from the tops of the houses. At length, says Livy, a stratagem gave the advance to the assailants, for they suffered the voice of a herald to be heard proclaiming that whoever laid down his arms might retire in safety. This relaxed their eagerness for the fight and they began almost everywhere to throw away their arms.

Bk. 9.

Caius Fabius Ambustus resorted to the same stratagem at the storming of Auxur, when the battle was continued, despite the capture of the city, by a large number of the defenders because they had no hope of quarter; so he suddenly gave orders for a proclamation to be made that none but the armed were to be injured. He thus induced all the remaining multitude voluntarily to lay down their arms, and in that fashion gained an easy victory.

Livy, bk. 9.

A similar thing happened at Sutrium, a city in alliance with the Roman people. On the same day on which it was stormed by the Etruscans it was unexpectedly recaptured by Camillus; he ordered the gates to be shut on the Etruscans, who were cut down in every quarter; all hope of flight was thus taken away; but (Livy tells us) the battle would

Bk. 6.

have been renewed and kindled by the despair of the enemy had not heralds, sent in every direction through the city, issued orders that their arms should be laid down, that the unarmed would be spared, and that none but those carrying arms would be injured. And then even those whose minds had been, in their last hope, obstinately bent on fighting, when hopes of life were offered threw down their arms in every direction and surrendered themselves, unarmed, to the enemy, which fortune had rendered the safer course.

Cæsar, too, at the battle of Pharsalus, when Pompey's battle-line had given way, adopted a very well-advised plan in order to prevent the soldiers from restoring their ranks, and with a view to obtain a more easy victory he sent heralds in all quarters to proclaim to his troops that they must spare their fellow-citizens and only wreak their wrath on the mercenaries. And whenever the victors came across the vanquished, they bade them, "Abide in safety," whence that expression "Abide in safety" (*sta securus*) got to be a kind of watchword. And Cæsar thus

gained his victory.

The admonition given by Lycurgus to his own people also points in that direction, namely, if ever they routed and overthrew an enemy in battle, only to pursue the fugitives far enough to secure the victory and then immediately to withdraw—not only because it was un-Greek to slay surrendered enemies, but also because of the utility of that course, for if the enemy knows that quarter will be given on a surrender their distaste for being killed will make them discover the advantages of flight over fight.

Appian, Civil war, bk. 2.

Plutarch, Apoph.

## CHAPTER XII.

*In time of victory the first and chief thought should be about peace.*

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| <p>1. We are better able to bear bad fortune than good fortune.</p> <p>2. Neither prosperity nor adversity to be borne in ill-restrained manner.</p> | <p>3. In time of victory peace to be insured.</p> <p>4. Nothing in war more miserable than a victory.</p> |
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[1] It is clearly a provision of nature that we can better bear bad fortune than good. For (as Tacitus says) prosperity probes the soul with sharper goads than adversity, since we tolerate wretchedness, but are corrupted by happiness. It was the recognition of this that led Abdolominus, who though of royal stock was very poor and needy and who had been made king by the Sidonians with the permission of Alexander, to make the following reply to Alexander's question how much patience he needed to bear poverty: "Would that I could endure a kingdom with the same amount." And Alexander the Great himself furnishes a good example of this same thing. For before Fortune emptied itself into his heart, he bore the beginnings thereof with moderation and wisdom, but he failed to bear its full development fitly. For it continually happens that the soul of a man gets so puffed up by prosperity that he can not then bear either any others or himself. No trust, then, should be reposed in even the greatest degree of prosperity, for it is uncertain what the evening will bring forth. Q. Curtius, bk. 4.

[2] It is accordingly just as much a mark of extreme weak-mindedness to bear prosperity immoderately as adversity; and their admonitions are clearly well founded who bid us, in proportion as we are lofty, to bear ourselves lowly. For (to quote Cicero), just as men send their horses to trainers when they get wild and mettlesome by reason of the frequency of combats, in order that they may manage them with greater ease, so men who have shown themselves unbridled and overweening in prosperity ought to be taken to the training-ground (so to speak) of reason and instruction, in order that they may learn the frailty of human affairs and the mutability of fortune; for the failure to impose a limit on happiness and to repress good fortune when it presents itself involves a ruin as disgraceful as the degree of elation was undue. Offic., bk. 1.

[3] And so in times of victory, which otherwise are times of insolence and pride, the first and chief thing to be thought of is peace; nor should this be delayed (as Demades used to say of the Athenians when

they were given up to an untimely lust of war) until we have to beg for it in mourning. For nowhere less than in war do events turn out as they are expected to. Accordingly when Mago, who had come to Carthage to announce Hannibal's victory at Cannæ, was granted audience by the Senate and was extolling in profuse style his brother's prosperity in Italy and was urging that the nearer the prospect of finishing the war was the more readily should aid be sent with all confidence to Hannibal, Hanno, who had always deprecated the undertaking of war against the Romans, remained quite unmoved thereby and wisely urged the Senate to consent in that time of prosperity to make the most of their fortune and to think on peace rather than on war. "For," said he, "if you let slip this advantage of the time when we may seem to give rather than to take conditions of peace, I fear that even this so goodly a show of growth as it maketh now will run up all to straw and bear no head to yield corn in the end."

Livy, bk. 23.

Now this attitude was scorned at the time, but afterwards, though too late, it was praised in vain by the Senate, at a time when they were reduced so low that the terms of peace, which they could have imposed, were begged for by themselves, and refused, and they were in that condition which Livy tells us of in relation to the Latins, i. e., that they could endure neither peace nor war, a condition which is of all things the most miserable. The same thing happened to Antiochus, who treated for peace when the Romans had already crossed over into Asia to campaign against him. The reply of Scipio was that this ought to have been done at an earlier date and not now when the King was bitted and mounted.

Plutarch, Apoph.  
Appian, Syrian war.  
Livy, bk. 37.

A wise man, then, will not put away a sure peace that is in the victor's hand in the fallacious hope of an uncertain victory that is in the hand of fortune. And so when Hasdrubal Hædus, the legate of the Carthaginians, was treating for peace in the Roman Senate, he said that men were seldom gifted with good fortune and good intelligence at the same time and that the Roman people were unconquered because they knew how to be wise and take good counsel in times of prosperity, and that if in times of good fortune the gods gave us good wit, we should reflect not only on what had happened, but also on what might happen.

Familiar Epistles,  
bk. 4, Epist. 3.

[4] And Cicero, in a letter to Marcellus, says: "Though everything in war is miserable, yet there is nothing more miserable than victory itself, for even if this befalls the better-disposed, it yet renders them fiercer and more headstrong, so that, even if they have not these qualities by nature, they are of necessity made to have them.

And so Cæsar, mindful of this weakness of the human soul, said that the only time for discussing peace with Pompey was the time when each of them had confidence in himself and seemed the equal of the other, but that, if fortune gave ever so little an advantage to one of them, he who seemed to be getting the upper hand would have nothing to do with terms of peace and would not be content with equal shares, seeing that he would rely on getting the whole.

Caes., Civil  
war, bk. 3.

## CHAPTER XIII.

*After the enemy has been crushed, what is the best method for keeping him quiet in a lasting peace.*

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. Not less valor needed in order to retain what has been won than to win it.</li> <li>2. The advice of Herennius Pontius concerning the Romans, who were surrounded at the Caudine Forks.</li> <li>3. The opinion of Camillus with reference to the conquered Latins.</li> </ol> | <ol style="list-style-type: none"> <li>4. The pronouncement of the Senate concerning the men of Privernæ who had been compelled to surrender.</li> <li>5. The opinion of Marcus Cato on rebels.</li> <li>6. The Romans allowed their allies to make war only under Roman leadership.</li> <li>7. The custom of founding colonies.</li> </ol> |
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[1] Seeing that there is not less virtue in preserving what we have gained than in acquiring it, and in the right use of victory than in victory itself—for as Ovid rightly says:

Casus inest illic, hic erit artis opus

(Chance controls the one, but in the other there is need of skill)

—and seeing that the object of war is to live in peace, our whole thought, after the enemy has been crushed, should be by what best means to restrain him forever from making war again. For what good was it to Pyrrhus to be great in crushing an enemy if he could not guard what he had gained? So much more successfully did he set himself to acquire dominion than to keep it! On this account he was compared by Anti-Justin, bk. 25. gonus with an unskilled gamester who, though he makes many good throws at dice, yet does not know how to make the best of his game.

[2] And in this connection I think that by far the most useful advice was that given by Herennius Pontius, father of Caius Pontius, at the time when the Samnites, under the leadership of Caius Pontius, had enticed the Romans by fraud into the Caudine Forks between two defiles: for the Samnites had no plan prepared for these joyful circumstances and so they determined that the advice of Herennius Pontius should be sought. Herennius, accordingly, was consulted by a messenger from his son and he gave it as his opinion that all the Romans should be set free from there as soon as possible without receiving any hurt. On this counsel being rejected, and the same messenger returning a second time for his advice, he recommended that they should all without exception be put to death. The meaning of his first plan, which he esteemed the best, was that by an act of extraordinary kindness perpetual peace and friendship should be established with a most powerful nation; and by his second plan he meant that the renewal of the war should be

put off to the distance of many ages, during which the Roman State, after the loss of these two armies, would not easily recover its strength. A third plan, he said, there was not.

And when his son and the other chiefs went on to ask him if a plan of a middle kind might not be adopted, i. e., that they should be dismissed unhurt and at the same time that terms should, by right of war, be imposed on them as vanquished: "Marry," quoth he, "this is the way indeed that neither winneth you friends nor yet riddeth you of your foes—to save them whom ye have provoked with shame and disgrace. The Romans are of this nature, that they can not sit still and be quiet so long as they have the worse—that is what will ever be fresh in their hearts whatsoever shame the present extremity shall fix upon them, and never will it give them any rest before they have been by manifold ways revenged of you."

Neither opinion, however, was adopted, and the Romans were sent under the yoke and that notorious peace of Caudium was made. But it was subsequently repudiated by the Senate on the ground of informality and the authors of it were surrendered to the Samnites. This people then found that they had got a renewal of a most bitter war instead of an arrogant peace and all the results thereof were not only brought to their notice, but took place almost under their very eyes. Too late and vainly did they then praise both plans of old Herennius, by blundering between which they found that they had trafficked the possession of victory for an uncertain peace and had let slip the opportunity alike for kindness and for severity, and had to fight with those whom they had had it in their power either to destroy as enemies or to convert into

Livy, bk. 9. friends.

[3] The conduct of the Romans was wiser, for when Camillus, after the defeat and subjugation of the Latins, was taking the instructions of the Senate with regard to their treatment, he is said to have held the following discourse:

"It now remains to be considered, since they annoy us by their repeated rebellions, how we may keep them in quiet and in perpetual peace. The immortal gods have put the determination of this matter so completely in your power that they have placed it in your hands whether Latium shall continue to exist or not. Ye can therefore insure to yourselves perpetual peace as far as regards the Latins, by adopting either severe or lenient measures. Do ye choose to adopt cruel conduct toward people who have surrendered and been conquered? Ye may destroy all Latium and make a vast desert of a place whence in many and serious wars ye have often obtained the use of an excellent army of allies. Do you wish, according to the example of your forefathers, to augment the Roman State by admitting the vanquished among your citizens? Materials for extending your power with the highest glory are at hand.

That government is certainly by far the most secure which the subjects find a pleasure in obeying. But whatever your decision is, it must be speedy. So many States have ye with their minds in a suspense between hope and fear, and it is necessary that ye be quit as soon as possible of your solicitude about them and that their minds, while they are still in a stupor through expectancy, be impressed either by clemency or by punishment."

Thus Camillus.

The Senate praised his exposition of these affairs of high policy, but said that, as the States were differently circumstanced, their plan should be so adjusted that a determination might be arrived at according to the deserts of each, the question being put regarding each State separately. This was, accordingly, carried out under a decree of the Senate, and to some the right of citizenship was granted, with a restoration of the exercise of their religious rites; to others the right of citizenship which they already possessed was continued, their offense not being imputed to public wrong-doing, but to the few ringleaders; others had their walls razed and were ordered to find a dwelling elsewhere.

Livy, bk. 9.

[4] The memorable pronouncement of the Senate in the matter of the Privernians is also relevant here. They had been driven to make surrender and their walls had been razed under a decree of the Senate, and their leader Vitruvius had been put to death together with some sharers of his guilt; and the consul Plautius had referred to the Senate the question, what to do with the rest of the multitude. Then one of the Privernian envoys, more mindful of the prospects to which he had been born than of present exigencies, when asked by one of the Senators, what punishment the Privernians had, in his opinion, deserved, answered, "Such as those deserve who deem themselves worthy of liberty." And when the consul saw that this stubborn answer the more exasperated those who were adverse to the cause of the Privernians, he asked him, with intent to draw from him a more conciliatory reply by means of a favorable question, "But if we remit to you the punishment, in what manner may we expect that ye will observe the peace which shall be established between us?" He replied, "If the peace which ye grant us be a good peace, it will be observed as both inviolable and eternal; if bad, as one of no long continuance." These words roused the anger of some, but the better part of the Senate interpreted his answer more favorably and said that what they had just heard were the words of a man, and a free man. And they asked whether it was credible that any people, or even an individual, would remain longer than necessity constrained in a situation which irked him so acutely. Peace, said they, was observed only when those at peace were voluntarily so, but fidelity was not to be expected where it was wished to impose slavery. And so by the authoriza-

tion of the Senate a proposal was laid before the people to grant rights of citizenship to the Privernians.

Livy, bk. 8.

[5] Marcus Cato, however, held that rebels could best be kept in their duty by making it impossible for them to rebel. And so he disarmed all the Spaniards this side the Ebro and razed all their walls on one and the same day. But this they took so much to heart that many committed suicide, a proud people not reckoning life worth living without arms. And in this Cato seems to have followed the example of

Livy, bk. 34.

Cyrus, who, when the Lydians again broke out into war, took away their arms and horses, and ordered them to ply the trades of the tavern-keeper, the public player, and the pimp. And in this way they became effeminate by soft living and lost their former manhood, and those whom war, before the time of Cyrus, had made invincible, ease and sloth conquered when they had fallen into habits of luxury.

Justin, bk. 1.

Now, after the capture of Saguntum, Hannibal ordered the slaughter, on a given signal, of all over the age of puberty. And this certainly was (as Livy says) a ruthless decree; yet the event showed that it was almost a necessity; for how could quarter be given to persons who either shut themselves up with their wives and children and burned their homes over their own heads or who, in the fighting line, did naught before the close of the engagement save what people would do who desired death? And this is clearly the meaning of the saying of Agesilaus, that it is hard

Bk. 10.

Plut., Apoph.

to be at the same time both merciful and wise.

[6] Again, the Romans, in furtherance of the policy of removing from their allies all opportunity of rebellion, thought it inadvisable to allow them to make war with their own army and strength and plans, or except under Roman leadership. And so when the Æquians invaded Latin territory and the spokesmen of the Latins requested the Senate either to supply help or allow them to take up arms and protect themselves, it seemed more expedient to defend the Latins, keeping them unarmed, than to allow them to take up arms again.

Dion. Halic.,  
bk. 8.

Livy, bk. 2.

It was also an ancient custom of the Romans, in connection with those with whom friendly relations had not been established by treaty or on equal terms, not to exercise sovereignty over them on a peace footing before they had made a surrender of all things, human and divine, and hostages had been received, and their arms had been taken from them, and garrisons had been stationed in the towns.

Livy, bk. 8.

[7] It was another custom of the Romans in the course of their subjugation of this or that people of Italy, to sequester part of their soil and settle a colony in it, or in the case of already founded towns to enrol new colonists of a special variety; and these colonies were stationed, like garrisons, in the provinces which had been acquired in war. And so Sylla, in prudent albeit tyrannical fashion, after he had made himself supreme in the State by force of arms, despatched those who had worked

Dion. Halic.,  
bks. 3, 4 and 5.  
Appian, Civil  
war, bk. 1.

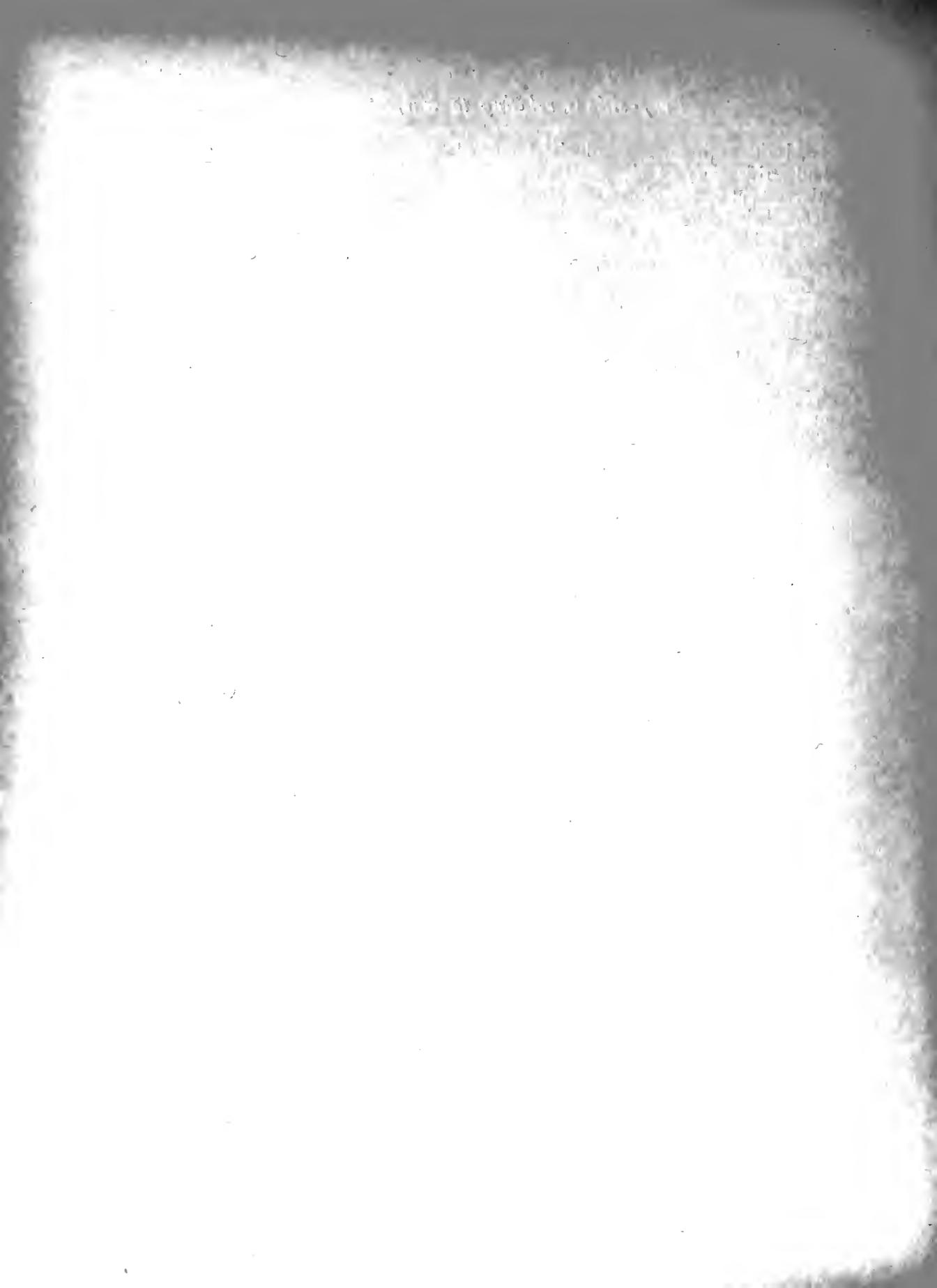
on his side in that war, as colonists into the lands and towns of those who had striven against him; and these persons, quartered in convenient places, kept Italy subject to his power and the landed estates were shifted from their former owners to them. This boon rendered them submissive to him for their whole lives and established his dominion in a marvellous manner, for, inasmuch as they could not assert their own claims except by ratifying the acts of Sylla, they became champions of his dignity even after his death; and those whose citadels and walls and goods and immunities they had taken away were prevented, by lack of resources, from hurting them.

Appian, Civil war,  
bk. 1.

Again, after the defeat of Perseus and the decree for Macedonian freedom, the Romans ordered that the King's friends and high officials, generals, naval and garrison commanders and all other subordinate officials whose habit it was to serve the King with humility and lord it over others, should quit Macedonia and migrate into Italy, so as to prevent them from compassing fresh schemes in Macedonia. And this seems to have been the purpose of Lycurgus in those laws of his called *Retræ*, in which he forbade the frequent repetition of war against the same people, lest they should learn the Spartan tactics. And so when Agesilaus had been carrying on a continuous war with the Thebans and fell wounded in a certain battle, it is reported that Antalcidas said to him, "You are getting a fine payment from the Thebans for teaching those who did not know how to fight": and in truth history says that the Thebans were never more bellicose than at that time, owing to the oft-repeated expeditions of the Lacedæmonians against them; for the fortune of war (as Quintus Curtius said) imparts skill even to the conquered.

Livy, bk. 45.

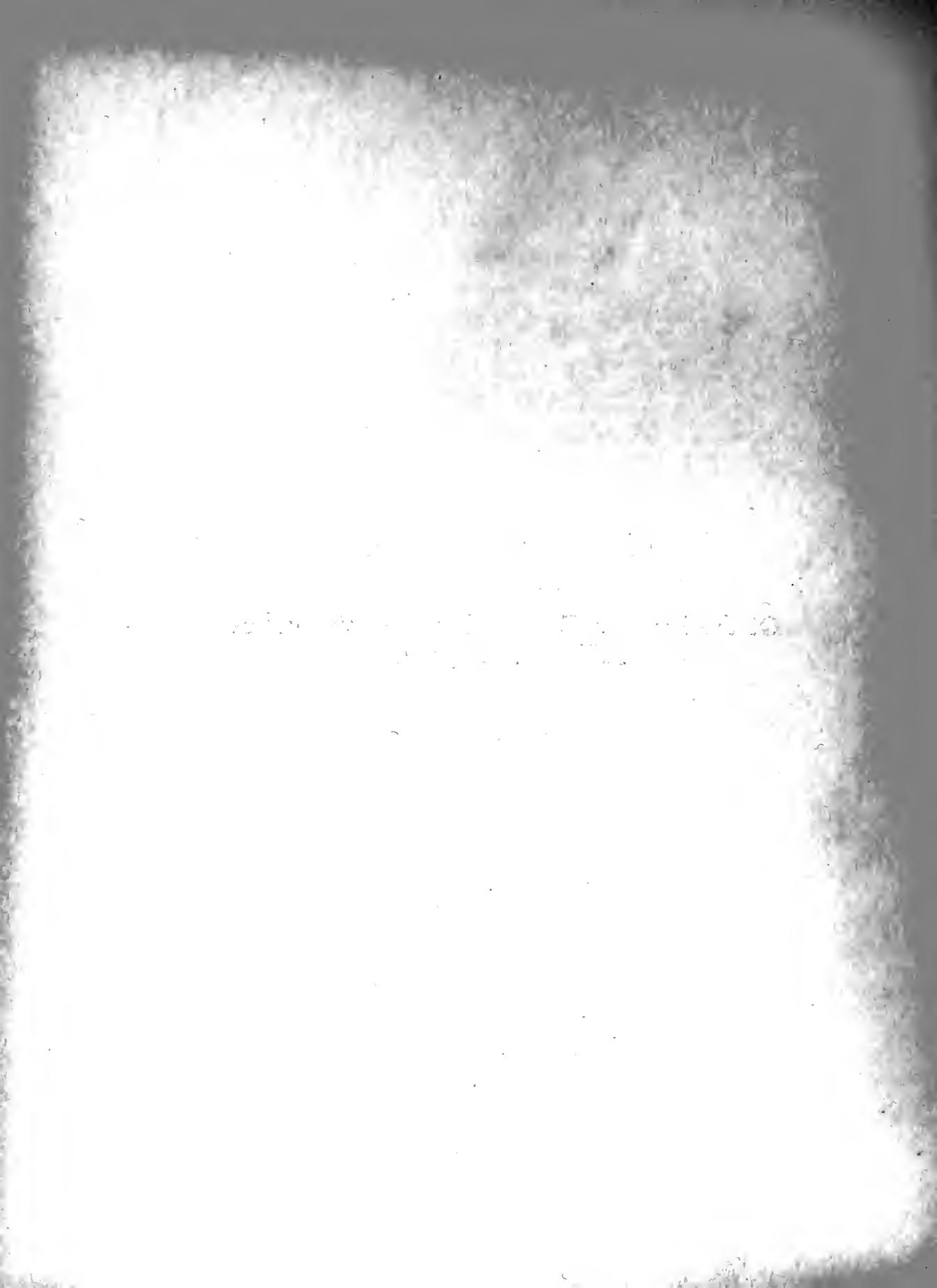
Plutarch, Apoph.



BOOK THE THIRD

---

Of the Law and Duties relating to War and of  
Military Discipline.



## CHAPTER I.

### *Of military discipline.*

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| <ol style="list-style-type: none"><li>1. Military discipline of great importance.</li><li>2. The raw and unwarlike rendered warlike by military discipline.</li><li>3. The luxury of Capua undid the previously unconquered army of Hannibal.</li><li>4. An example showing the difference between the neglect and the maintenance of military discipline.</li><li>5. Women camp-followers a disgrace.</li></ol> | <ol style="list-style-type: none"><li>6. Incumbent to reduce the amount of baggage.</li><li>7. The "mules of Marius."</li><li>8. The derivation of "exercitus" (i. e., army).</li><li>9. Military laws.</li><li>10. Three things that soldiers have in charge.</li><li>11. Military discipline.</li></ol> |
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[1] History tells us how great the importance of military discipline is: so does daily experience; and it is abundantly clear that the conquest of the world by the Roman people was accomplished by nothing else than the training in arms, the discipline of the camp, and the practice of campaigning. Quintilian puts this very well when he says:

"Rightly considered, the empire of the Roman people has been based until now on military discipline; for we are not more numerous than the Cimbri, or possessed of greater resources than very wealthy kingdoms, nor is contempt of death easier to us than to most barbarians, though they may have no great inducement to live. It was the sternness of our institutions, our system of military service, our love of toil, our daily exercisings, and our assiduous consideration of questions of war."

And so Valerius Maximus said that there was no bond so lasting as that of military discipline, that preëminent adornment and buttress of the Roman power, in whose bosom repose the serene and tranquil blessings of peace.

[2] And indeed we read how numerous armies of slaves and unwarlike recruits have been made invincible and warlike merely by discipline and command and, on the other hand, how numerous armies of seasoned troops, hitherto unconquered, have been corrupted and sapped merely by license and by all their vices and by the neglect of discipline, and have been undone before ever they set eyes on the enemy. And a proof of this is furnished by Tullus Hostilius, King of the Romans, who roused the Romans to war after they had lived forty years of peaceful ease, and merely by means of military discipline rendered them excellent soldiers, though previously they had had no experience of it. And Tib-  
erius Sempronius Gracchus, who had an army of slaves given him, in a short time, by dint of military training and system, brought it to pass that, when they were in battle-array, no one ever thought about their

Vegetius, de re milit., bk. 1. Livy, Preface to his History.

On the soldier Marian.

Bk. 2, ch. 7.

Livy, bk. 1.

race and origin, and that they were a protection to the allies and a terror to the enemy. So, also, after Thebes had been freed from its subjection to the Spartans, Pelopidas and Epaminondas, by means of military institutions, had no difficulty in turning the Thebans from unwarlike men into excellent soldiers, so that they were not only the equals but the superiors of the Spartans.

Now Scipio Æmilianus, that excellent commander and consummate master of the art of generalship, in order to break the high courage of the city of Numantia, which had been but fostered by the faults of his predecessors in the command, is said to have had two thousand harlots and everything else which merely ministered to pleasure removed from his camp directly he entered it, and in that way to have repaired the failure of military discipline. By this method he succeeded in burning and throwing down in ruins level with the ground that courageous and haughty Numantia; and so (as Valerius Maximus says) for having neglected military discipline Mancinus saw himself compelled to make a deplorable surrender and Scipio, for having preserved it, obtained as recompense the most brilliant triumph.

And Metellus followed Scipio's example by restoring military discipline into the army which he took over from Spurius Albinus, when in Africa during the Jugurthine War, and which the latter had spoiled by excessive indulgence. It is said that he began by issuing a proclamation banishing everything that conduced to cowardice; and he won a glorious victory over the enemy.

And when Scipio Africanus the younger was despatched as consul into Africa and saw the corrupt state of discipline and the slothful plundering and greedy habits which the troops had developed under Piso, he realized that he would never conquer the enemy until he had got his own men in hand; so he severely rebuked them in a great speech and drove away all non-soldiers and re-established military discipline, and thus succeeded in overthrowing the powerful Carthage, the rival of Rome's empire.

[3] The army of Hannibal, on the other hand, which had so often and so long endured every human ill and had never known or been accustomed to comforts and had not been sapped by the virulence of any evil, was ruined by the excessive comforts and pleasures of the immodest Capua. For sleep and wine and feasting and harlots and baths and ease (which by wont grows daily more agreeable) so enervated their bodies and souls (says Livy) that it was their victorious past that kept them safe and not their present strength.

And in this the general is considered by those who are skilled in the art of war to have committed a greater error than in not marching his troops to Rome forthwith from the field of Cannæ. For his delay on that occasion might be considered as only to have postponed his victory,

but this mistake to have deprived him of the power of conquering. Accordingly, by Hercules, it was as though he marched out of Capua with another army, for it retained in no respect any of its former discipline. For most of the troops returned in the embrace of harlots and as soon as they began to live under tents, and the fatigue of marching and other military labors tried them, they broke down, like recruits, both in bodily strength and spirit. From that time, during the whole period of the summer campaign, great numbers of them slunk away from the standards without furlough, although there was no other lurking-place for the deserters than Capua. Marcus Marcellus, accordingly, who had drawn up his troops near Nola, upbraided the enemy, with a view to raise the courage of his own troops, by saying that Capua was Hannibal's Cannæ, for that there he had lost his warlike valor, there his military discipline, there the renown of his past and of his future, too. Marcellus then engaged the enemy in battle and routed him.

And just as Capua was fatal to the army of Hannibal, so Babylon was to the soldiers of Alexander, and quite corrupted their military discipline, so much so that if Alexander had only had an enemy, his loss of strength for future conflicts would beyond doubt have been disclosed (so wrote Quintus Curtius).

Bk. 5.

[4] And, to be brief, we can not have a better instance of what the neglect or maintenance of military discipline means, than that of the Romans; for they who aforesaid were superior to all people in their instinct for justice and their military glory, later on, when discipline decayed, were conquered by every one. And so Cato (in Sallust) says:

“Do not suppose that our ancestors, from so small a commencement, raised the republic to greatness merely by force of arms. If such had been the case, we should enjoy it in a most excellent condition; for of allies and citizens, as well as arms and horses, we have a much greater abundance than they had. No, there were other things which made them great, which among us have no existence—such as industry at home, equitable government abroad, and minds impartial in council, unswayed by any improper or corrupt motive. Instead of such virtues we have luxury and avarice; public distress and private superfluity; we extol wealth and yield to indolence; no distinction is made between good men and bad; and ambition usurps the honors due to virtue.”

And when Fabricius was sent as envoy to Pyrrhus, and heard at his court one Cyneas of Thessaly telling how some Athenian, of repute for wisdom, maintained that pleasure was the sole motive of human action, he shrewdly took the speech as an augury and prayed that this wisdom might straightway descend on his enemy Pyrrhus and on the Samnites. It was politic, too, of the Spartan State to withdraw for so long the eyes of its citizens from looking to Asia, for it recognized that thence flowed all seductions and certain most baneful poisons, both of body and of mind, and that more was lost by such victories than was gained in war.

Val. Max., bk. 4,  
ch. 2.Val. Max., bk. 2,  
ch. 6.

[5] Hence, too, our forebears reckoned women camp-followers a great disgrace and matter of severest reproach and a soldier was not allowed to have his wife or family with him save by permission of the prince, and a soldier might not even marry a wife when in a province. And a proconsul was liable for the delicts of the wife whom he had taken with him into his province; and, indeed, Ulpian says that it is better for a proconsul to go to his province without his wife. This was the opinion, too, of Severus Cæcina (in Tacitus), for he said it was a characteristic of the companionship of women to hinder peace with luxury and war with fear and to turn the marching column of the Romans into the likeness of a barbarian raid. Formerly, too, a constitution of Constantine forbade unions between low women and certain soldiers, but the emperor Justinian amended this and allowed soldiers to marry what wives they pleased so long as they were free-born women.

Cod. 12, 35, 10.

Dig. 1, 16, 4, 2.

Annals, bk. 3.

Nov. 117, c. 6.  
Cod. 5, 4, 21.Cod. 5, 4, 6, and  
Dig. 23, 2, 65.

Dig. 1, 16, 4, 2.

[6] The task of keeping down the amount of baggage is also a matter intimately connected with military discipline, for this often is a very serious hindrance on a march. And so when Philip of Macedon first enrolled an army he forbade the employment of vehicles and would not allow his cavalry more than one servant each and his infantry only one servant among ten to carry mills and ropes. Scipio forbade the keeping of pillows and was himself the first to use a hay pillow and he would not let his men ride on asses or mules when on the march, saying that very little was to be expected in war from him who could not go on his own feet.

Appian, Span. war.

[7] Caius Marius, in order to reduce the amount of baggage, had the dishes and eating vessels of his men fitted into bundles and placed on prongs, under which the burden of them was more manageable and easy—hence the popular saying, “mules of Marius.” And the same thing was also provided by the constitutions of the Kingdom of Spain.

Reg., bk. 1, tit. 22,  
par. 2.  
Tuscul., quest., bk. 2.

[8] And this is what Cicero had in mind when he said: “You may see whence the very name of our army, i. e., *exercitus*, is derived: Great is the labor of an army on the march. Then consider that they carry more than a fortnight’s provision and whatever else they may want, including the burden of the stakes; for as to shield, sword, or helmet, they look on them as no more incumbrance than their own limbs, for they say arms are the limbs of a soldier, which they carry (says he) so commodiously that when there is occasion they throw down their burdens and use their arms to fight with as readily as if they were limbs.”

Alexander, indeed, when his force was so burdened with booty and the apparatus of luxury that it could scarcely move, had the stuff collected, all except absolute necessities, and put a torch under his own to begin with and then ordered the rest to be burned, so that the mischance should fall on the stuff rather than on discipline.

Quint. Curt., bk. 6.

[9] Further, as to military discipline, it was provided by a military law that camp-followers should not wander about indiscriminately among the cavalry, and that no soldier should sell the corn supplied to him at the public expense or exchange his booty of cattle or slaves for wine, and that no private soldier should have a slave or beast of burden in the battle-array or camp, and that no one should afterwards be captain where he had been military tribune, nor one who had been captain afterwards become private. And so Livy tells how one Volero, a ple-beian, who in earlier expeditions had been a captain, was enrolled among the privates and refused his military duties, alleging that he ought not to be made a private where he had been a captain, as he had not incurred any ignominy during his service. A soldier, too, who failed to demand his rations within proper limits of time had them withdrawn. Bk. 2.

Cato, too, urged that soldiers should be instructed to be fierce towards enemies, but humane towards fellow-citizens and allies, slow to inflict an injury, but prompt to avenge one, and desirous of nothing more than winning praise and glory. And in olden time it used to be sedulously inculcated that soldiers should deem their first bond to be the obligation of their oath; and the second the love of each other in, as it were, an inexplicable union; and the third the iniquity of desertion. Dion. Halic., bk. 9.

[10] Lucius Æmilius Paulus used to say that there should be one commander in an army to consider and devise what measures should be adopted, at times by himself and at times with those whom he has summoned to his councils, not discussing his plans either openly or secretly with those who have not been summoned, and that the private soldier has in charge three things, to keep his body as strong and active as possible, his weapons in condition, his food ready for sudden orders; and for the rest to know that the care of himself belongs to the immortal gods and his general; and that an army was not in a healthy condition if its consul and commander were affected by rumors of the mob. For (as Tacitus says) soldiers ought to be ignorant of some matters and to know about other matters. The rigor of discipline varies with the authority of commanders, so that there are many orders which it is expedient should only be given through centurions and tribunes. Cod. 12, 37, 6.

It is rather by the obedient attitude than by the putting forth of officers' orders that a military situation is kept in healthy condition; and that army will be bravest in time of crisis which is the quietest before the crisis. And so Cæsar rebuked the rash eagerness of his troops before Avaricum, for they determined for themselves where to go and what to do, and did not halt at the signal for withdrawal, and could not be kept in hand by the military tribunes and legates; and, much as he admired their high spirit, which neither fortified camps nor high mountains nor walled towns could check, yet, said Cæsar, he must equally blame their license and arrogance in thinking that the planning of victory and of Livy, bk. 44.

Caes., Gallic  
war, bk. 7.

developments was their business rather than the business of their generals, and that he wished for modesty and self-restraint in his troops not less than for valor and high spirit.

[11] Again, there is preserved in Flavius Vopiscus a letter from Aurelianus Cæsar to some tribune, in which military discipline is briefly touched on, as follows:

“If you want to be tribune, nay, if you want to live, control the hands of your men. Let none steal another man’s chicken or seize his sheep or carry off his grapes or requisition oil or salt or wood, but let him be content with his rations; let him make for the booty of the enemy and not the tears of the provincials; let his armor be clean, his tools in repair, his sandals stout, his clothing new; let him put off his old clothing; let him spend his pay on a sword-belt, and not in a cook-shop; let him wear armet and ring; let him groom his horse and clean his own stall, and not sell the animal; let him readily attend to the company’s mule; one soldier should humor another as if he were his slave; a soldier is entitled to free medical aid; soldiers should give nothing to soothsayers; should live chastely in their quarters; and the one who goes to law should get a flogging.” So he.

Furthermore, for the better keeping of soldiers in their duty, governors of provinces through which troops pass have instructions to have all supplies ready for them, without giving cause of complaint to the provincials, and whatever expenses are incurred in so doing are reckoned part of any tribute-money that may be owing to the emperor. Soldiers, too, are bidden to be content with such food as is found in the different localities, and they can not claim any different food. This is also laid down in the constitutions of Gaul.

Nov. 130, col. 10.

## CHAPTER II.

### *Of the duties of legate and tribune and other officers.*

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|------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|
| 1. The principal military officials among the Romans.                                                      | 6. The good governance of an army.                                                                   |
| 2. Who legates are.                                                                                        | 7. Furlough to be sparingly granted to soldiers.                                                     |
| 3. The functions of a legate different from those of a general.                                            | 8. Soldiers to be promoted for merit.                                                                |
| 4. The limits of one's commission ought not to be exceeded in war.                                         | 9. The military tribunes had authority over the men and a vine-staff used to be carried before them. |
| 5. Whether the terms of a commission can be departed from when a favorable change of circumstances arises. | 10. The functions of tribunes.                                                                       |
|                                                                                                            | 11. The punishment for a false return of the number of the troops.                                   |
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[1] Who were in olden times the principal military officials among the Romans is clearly shown by the following words of the dictator Papyrius, as reported by Livy:

Livy, bk. 8.

“So that the soldier would not obey the commands of the centurion, nor the centurion the tribune's, nor the tribune the legate's, nor the legate the consul's, nor the master of the horse the dictator's: and the orders of generals-in-chief would be disregarded.” Now we have already spoken of the office and power of a general or commander of an army.

[2] Legates were persons accompanying an expedition and helping in its affairs, who were appointed to consuls and generals in order to act as their deputies and carry their plans into execution. They were also in a position to give the most trustworthy testimony of any cases of good counsel or of any acts of bravery or of deserving valor or of cowardice, and also of the degree of care and good-faith and diligence and military discipline with which the commanders governed the army and camp; and whether their reports contained anything false or ill-founded, or not the whole truth. And the authority of legates was such, alike as regards the administration of a province and the management of an army and the drawing up of a battle-line, that if the consuls or the general were absent or prevented, they exercised sovereign power.

Alex. ab Alex.,  
Genial. dies, bk. 6,  
ch. 3.

Civil war, bk. 3.

[3] Furthermore, it is clear that (as Cæsar says) the functions of a legate are different from those of a general. The former has in everything to carry out orders, while the latter has free discretion in the measures he takes for the good of the State. And so Cæsar said that the policy of Sylla, whom on his departure he had put into command of the camp, did not seem to have been a faulty one, namely, to recall his men when they pursued Pompey's troops too far, although it was a common belief that, if a keener attack had been assented to, the war could have

been ended on that day. For when Sylla was left by Cæsar in charge of the camp merely, he set his men free and was contented therewith and declined to take part in the engagement. For the same reason Quintus Titurius Sabinus, Cæsar's legate in the Gallic war, kept within the camp, although the enemy were already up to the trenches of the camp, for he thought that a legate ought not to fight with so numerous an enemy, especially in the absence of the supreme commander, unless on equal ground or because some favorable opportunity had arisen.

Caes., Gallic war, bk. 3.

Further, just as the Romans were extremely lenient with their generals (to whom they granted full discretion to provide for the State's highest interests) when they had sustained a reverse, as has been said elsewhere, so did they prove harsh in the punishment of legates, tribunes, and other subordinate officers in a case of contempt or disregard of the supreme authority.

[4] For in military matters it has always been reckoned a very grave fault, worthy of a capital accusation, for one to exceed the limits of his commission, even though he meet with success. It was especially on this ground and because of its accordance with old usage that the contention of the dictator Papyrius prevailed, when he demanded that his master of the horse, Quintus Fabius, should be given up to punishment for having led out the army contrary to his commands, although he had returned to camp victor over the Samnites. The Roman people, however, and the tribunes of the plebs interposed on behalf of Fabius, and after a time, overmastered by a speech of Papyrius, they turned to prayers and entreaties that the dictator should remit to them the punishment of the master of the horse; so he yielded; but he called them to witness that Quintus Fabius was not acquitted thereby of the guilt of fighting contrary to the orders of his commander, but that, after having been condemned as guilty, he was granted as a boon to the Roman people, and to the college of the tribunes which supported him with its prayers and not with the regular powers of its office. As to himself (said he) it was enough to have vindicated military discipline and sovereign authority, which had been placed in jeopardy.

Livy, bk. 8.

[5] There are, however, some who think that the terms of a commission may be departed from if, owing to change of circumstances, an opportunity arises of successful action—as, for instance, some chance occurrence promises a successful result and an almost certain victory—for fear of losing an opportunity of success which has been offered by the gods. This is, however, a thorny question, especially when reckoning has to be made with some hard and inexorable Papyrius or Manlius or Postumius, who holds that the whole office of a general is destroyed and dissolved if any one receives a command without due respect, or even with circumspect advice. For the limits of a commission must be jealously observed and nothing be done inconsistent with it, even if the

By inference in Dig. 17, 1, 30. Felinus, generally, on c. 1, X, 1, 2 (col. 14), and c. 9, X, 1, 33 (col. 3). Cremen. Sing. 150, and Rochus Curt. on c. 13, X, 1, 2 (col. 2).

probable result thereof would be the greater advantage and profit of the author of the commission. And this is a question which has been variously treated, even by philosophers. Beyond doubt the severity of Papyrius deterred others from successful action, although they had the opportunity; and the example of Quintus Fabius (says Livy) was so much before the eyes of the legate, Marcus Valerius, who commanded the camp in the absence of Papyrius, that he did not fear the forces of the enemy more than the grim anger of the dictator. And so when the commissariat was ambushed in difficult ground with heavy loss, the common belief is that the legate could have relieved it if he had not been in such dread of the stern edicts.

[6, 7] Further, the governance of an army does not consist alone in keeping discipline (as Marcian said), but also in observing it; and he who commands soldiers ought to grant them furlough as sparingly as possible, so much so that a soldier ought not to be sent to fish or hunt, and this was so laid down in the discipline of Augustus. In fact, for the greatest security, the tribune can not allow furlough to more than thirty men; if he allows it to more, their pay is to be passed on to the treasury, and the tribune who has allowed it must make the pay good to the men, in addition to the penalty of losing his girdle. But in a time of active service, or when an attack of the enemy is threatened, no one at all should be away from the standards and it will be a capital offense to allow furlough; and absence from the standards is so much disfavored that a soldier while on furlough is not taken as being absent on State business.

[8] Further, the commander of the army can not, at his mere pleasure, move a man from one rank to another, except the emperor give consent on grounds of utility to the State; for, as the emperor says, none should attain increase of honor by canvassing, but only by labor, and none should be promoted to dignity by voting, but by labor and according to due gradation of ranks; and that man ought to be in front of others who is put there by longer service or by labor. And so the consul Quintus Metellus, although prevented by no law from having his son as perpetual pupil-attendant (*contubernalis*), preferred, nevertheless, that he should earn the position in due course. And Theogenes the Athenian is reported to have employed an ingenious stratagem, while leading his army to Megara. Some soldiers besought promotion, and he replied that he would grant it to them then and there; and then he moved his cavalry to the front and bade them face about and, feigning to be the enemy, make an attack on their comrades; and when this was done he allowed the ranks of those whom he had in readiness as if for an attack of the enemy to be so arranged that each man held the position in which he wished to be and, as all the slackest had stepped back and all the keenest had jumped forward, he promoted each man in military rank just according to the place in which he found him standing.

It was, also, ordained of old that no one could be admitted to the tribuneship who had not previously commanded a wing, nor command a wing unless he had been in charge of a cohort; and it was ancient usage that when in camp a private should go and salute his centurion every morning and await orders, and similarly a centurion the tribune. But Hadrianus Cæsar promoted to the tribuneship men of ripe years and great sagacity, who had been taught by age and experience. And he issued an edict forbidding the appointment of a beardless young man to that office; and Alexander of Macedon put such a value on his tribunes and centurions that he would allow no one under sixty years to command the ranks. It is clear, however, that at times, in days gone by, these dignities were conferred on the unworthy and even on boys under puberty.

Dig. 27, 1, 8, and  
Cod. 6, 21, 18.

It was also enacted by a military law that none should subsequently be made a captain where he had been tribune, for the centurion, decurion, and commander of the ranks were inferior to the tribune; but this rule, so Livy says, was not made in favor of tribunes, but it was enacted by a military *lex sacrata* (i. e., law devoting to the infernal gods one who violated it) on the demand of some confederate soldiers adversely to Publius Salonium, who was military tribune and chief centurion in almost alternate years. But military tribunes may have centurions and decurions under them, subject, however, to the authority of the legate.

Bk. 7.

[9] Further, it is usual for military tribunes, when in command of camps and legions, to exercise authority over the troops, and the lictors carried vine-staves before them to deter the insolent, and not rods as in the case of a consul or prætor. For the Romans used to beat contumacious soldiers, not with rods, but with vine-staves; but if they were foreigners, with cudgels, and this punishment was not infaming in character, as was that inflicted by a lictor. It must, however, be observed that tribunes could not punish a Roman citizen capitally, nor any other soldier, as we shall remark elsewhere. It was, too, an early usage for the head of the State, when raising any one to the tribuneship, to give a sword into his hand, signifying thereby that he was to have authority over the soldiers according to military law.

Plin., bk. 14,  
ch. 1.

Below, chap. on  
military courts.

[10] Now it was the especial function of a tribune to supervise the camp and army and see that it was properly entrenched and patrolled; to order ever-watchful sentinels, so that the enemy could not effect anything by stealth; to have the troops who were in camp listening for a word and intent for a command; to lead them to exercises, to appoint their stations, to collect the keys of the gates, to visit the watch, to attend to the provisioning of the troops, to sample the provisions, to repress the frauds of the corn-measurers, to listen to the complaints of the men, to chastise their offenses within the limits of his authority, to inspect the invalided, to take charge of the wounded, and above all to administer to the soldiers the solemn oath.

Dig. 49, 16, 12, 2.

Further, it was from the tribunes that the troops received the watchword—whether they were proceeding to march against the enemy or to lay out a camp or to take their position in the front line of battle or in the reserve line, or to go on outpost duty or on watch. And the tribunes received instructions from the general about the appropriate signal. It was also the peculiar function of the tribunes, in the heat of battle, to cheer and admonish the men, individually and collectively, and to take note of their conduct in attack. And it was theirs to grant a discharge to soldiers who had performed the military service that was required of them, on good cause shown and upon the authority and subject to the orders of the consuls—it not being competent for the tribunes to do this on their own authority. And so the censor Quintus Fulvius Flaccus removed his brother Fulvius from the Senate for having discharged a cohort belonging to the legion of which he was tribune, without the orders of the consul. Val. Max., bk. 2, ch. 7. Livy, bk. 31.

And, lastly, it was in olden days an especial duty of generals and tribunes and centurions, when in summer-camp, to make the recruits who had recently joined march up and down and over and over again in squads, and shout and take up positions and submit to authority and obey the word of command and form in close order, or make a wedge or a phalanx, and follow the standard and accustom themselves to endure weariness and heat and vigils. And all this in order that they might not encounter the enemy without plan or governance, or be beaten and retreat, and that every one might know his place in the ranks, in such sort that by daily use their instincts would tell them what was to be done and what left undone, without any outside impulse or command. And this special drilling is attributed to Iphicrates, who by that means taught the troops so to take up their position in battle-line, without the general's intervention, as to display the most scientific disposition.

[11] Further, if a tribune or centurion or any other person makes a false return of the numbers of the troops and intercepts the extra pay he is condemned in fourfold and degraded; but by the constitutions of Gaul he is punished capitally. Cod. 1, 27, 2, 8. He also who takes money in connection with the draft or discharge of a soldier is liable under the *Lex Julia repetundarum* (i. e., on extortion) and is, accordingly, usually punished by exile Dig. 48, 11, 6, 2. or worse, and anything given to obtain exemption from levy as a recruit Dig. 48, 11, 7, 3. can be reclaimed as if given on immoral consideration. Cod. 4, 7, 3.

Further, any one who, during a passage of troops, receives anything from towns or estates, by bringing improper pressure to bear, is liable in double; but one who has plundered a province is usually recalled for so doing and ordered to make fourfold restitution. Nov. 130, col. 10. Dig. 48, 11, 1.

## CHAPTER III.

*Of quartermasters (metatores, mensores).*

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| <p>1. Quartermasters, who they are.<br/> 2. How quarters are assigned to troops.<br/> 3. Who are exempt from the inconveniences of supplying quarters.</p> | <p>4. Nothing over and above quarters can be claimed by the troops.<br/> 5. Punishment of quartermasters who take bribes from those who supply quarters.</p> |
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[1] The name *metatores, mensores*, i. e., quartermasters, is given not only to those who select the place for pitching a camp or pavilions or tents (a topic well dealt with by Polybius), but also to those who go in advance of troops who have to be quartered in towns and indicate the houses, fixing marks on them and giving the names of those for whom quarters have to be found in each house; and any one who dares to destroy these marks is liable to condemnation for falsification.

On Roman  
Camps, and  
Vegetius,  
bk. 2, ch. 7.

Cod. 12, 40, 1.

[2] Further, in accordance with a rescript of the emperors Arcadius and Honorius, a house was divided into three parts and a third part was allotted to the troops—in such sort that the owner had the right of first choice, the guest the second, and the third part was left again for the owner. Any compartments used for sale of merchandise are ordinarily exempt from this division, unless there does not happen to be enough room for the troops in their third of the house. Men of illustrious rank, however, ordinarily have half a house, not a third, assigned to them—on the terms that the one chooses and the other makes the division. Antigonus, however, decreed that none under fifty years of age should be quartered on a *materfamilias* (matron); and when he heard that his son had gone off into the house of one who had three very good-looking daughters, he said, “I hear, my son, that you have very crowded quarters in a house where there are several owners; take more roomy quarters.” And he bade him make the change. Further, a soldier whose home is in that town can not demand that other quarters shall also be assigned him.

Cod. 12, 40, 2.

Cod. 12, 40, 2.

Cod. 12, 40, 9.

[3] Certain persons are free from the annoyance of having to provide quarters: the physicians of the sacred palace, to wit, professors of the liberal arts in the City of Rome, and painters of free birth; men of consular or patrician rank, consuls, the heirs of these persons, and others of preëminent dignity. This important immunity was granted them by a constitution of the Emperor Arcadius: and the Emperor Claudius, by a decree of the Senate, forbade privates to enter the houses of senators, even for the purpose of paying their respects.

Cod. 12, 40, 8.

Cod. 12, 40, 10.

Suetonius, Life  
of Claudius.

[4] Men of low estate, too, ought not to be compelled to supply quarters to soldiers; and in towns quarters only can be demanded for the troops, so that they can not claim from their host anything necessary for themselves or the keep of their animals, nor indeed can they receive such things even from willing hosts.

Dig. 1, 18, 6, 5.

Cod. 12, 40, 5; and  
12, 41; and 12, 37, 3.

[5] Quartermasters who have extorted money by improper means from those supplying quarters must restore it twofold and are punished by exile and, according to the constitutions of Gaul, capitally.

Nov. 130, col. 10.

## CHAPTER IV.

*Of soldiers and who can serve as such.*

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| <ol style="list-style-type: none"> <li>1. Soldiering is not sinful.</li> <li>2. A soldier may lawfully kill an enemy.</li> <li>3. Who are called soldiers.</li> <li>4. Clerics not to be enrolled as soldiers.</li> <li>5. Nor agriculturists.</li> <li>6. Nor slaves.</li> <li>7. Nor those capitally accused.</li> <li>8. Nor heretics.</li> <li>9. Nor those branded with <i>infamia</i>.</li> <li>10. Nor crippled persons.</li> <li>11. Soldiers forbidden to engage in agriculture.</li> </ol> | <ol style="list-style-type: none"> <li>12. No one can have two military positions of differing kinds.</li> <li>13. A soldier may not be a <i>procurator</i> (agent).</li> <li>14. Of the age for soldiering.</li> <li>15. Veterans may be levied.</li> <li>16. Natives rather than foreigners to be employed as soldiers.</li> <li>17. The Romans for a long time served at their own costs.</li> <li>18. The amount of a Roman soldier's pay.</li> </ol> |
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[1] To take part in a just war is no wrong, as we have elsewhere shown; but to do so for the sake of booty is a sin. And so, when John, a man most acceptable to God, was asked by the soldiers, who were anxious about salvation, what they should do, he did not forbid them to serve as soldiers, but said, "Do violence to no man, neither accuse any falsely, and be content with your wages."

Luke, ch. 3. And  
c. 2, C. 23, qu. 1,  
last para.

[2] Accordingly, both the canon and the civil laws allow a soldier to kill an enemy in war; nay, if he abstains from doing so, he is guilty of desertion and contempt of sovereign authority.

c. 13, and c. 41,  
C. 23, qu. 5.  
And Dig. 48, 8, 3;  
and 49, 16, 7.

c. 13, C. 23, qu. 5.

[3] Now those only are called soldiers (*militēs*) who have had the oath put to them and have taken it and have been incorporated in the ranks. Sailors and oarsmen in the navy are "soldiers."

Dig. 37, 13, 1.

[4] Further, not every one is admissible as a soldier and some persons are not compelled to become soldiers; for clerics, first of all, are exempt from military service, a concession made in olden days, as part of a general immunity, by the Gauls to their Druids, who had charge of religious matters. The priests also, on Romulus' foundation, were free from all warlike duties; to this law an addition was made, after the capture of the city by the Gauls, that priests should have this immunity

Caes., Gallic war,  
ch. 6.  
Dion. Halic., Rom.  
antiq., bk. 2.

Appian, Civil war,  
bk. 2.  
Plutarch, Life of  
Marcellus.

Philipp. 5 and 8.

except in the event of a Gallic war. Cicero, however, tells us that in the Gallic war the usual exemptions prevailed, but not at the time of the Gallic and Italian revolt—from which he infers that revolt is a graver thing than war. But clerics are forbidden to serve as soldiers: and of them and of himself Ambrose said: "Let not the soldiers of Christ look to iron missiles and armour; but grief, weeping, tears, and entreaties were my weapons against the enemy." For no man that warreth

c. 3, C. 23, qu. 8.  
And c. 3, Dist. 36.  
And c. 1, and c. 27,  
and c. 28, C. 23,  
qu. 8.

for God entangleth himself in the affairs of this life (as the Apostle says); and if a cleric should take service as a soldier he will be unfrocked. But one in lesser orders who fights in a just war—unless he kills or wounds—is not irregular.

[5] Agriculturists, also, are not admissible as soldiers, even when they willingly offer themselves, nor can they be compelled to serve if unwilling; for it is not less important to the State to have men to till its soil than to have men to fight its battles. Hence it has been decreed that agriculturists who have enlisted as soldiers can be reclaimed into their former condition; for the dirt of the fields does not go well with the honor of soldiering.

[6] Wherefore also Marcianus ruled that slaves ought to be kept off all military service: otherwise they may be punished capitally. But a distinction must be drawn, in accordance with a rescript of Trajan, according as they have offered themselves voluntarily or have been levied or have even been given as substitutes; for if they have been levied, it is the official (*inquisitor*) who is in fault; if they have been given as substitutes, it is the fault of those who have given them; if they came of their own accord with full knowledge of their status, the fault must be visited on them. Indeed if it be with the cognizance of their owner that slaves have succeeded in enrolling themselves as soldiers, he will be deprived both of his ownership and of the rights of patronage (*jura patronatus*).

Furthermore, after the defeat at Cannæ the dictator Marcus Junius and Tiberius Sempronius, his master of the horse, made a novel levy and, under the pressure of necessity, bought at public cost eight thousand strong youths out of slavery and armed them—having first questioned them one by one whether they were willing to serve as soldiers (whence they were called *volones*, volunteers)—and subsequently, by dint of discipline and authority, they turned them out first-rate soldiers. And when the same Tiberius Sempronius was appointed consul, he issued instructions to the legates and tribunes that no reproaches based on the former status of any soldier should sow discord in the ranks; that the veteran should allow himself and the recruit to be treated on the same footing, and the same as between the freeman and the “*volō*”; and that all should esteem those to be sufficiently honorable and well-born to whom the Roman people had intrusted its arms and ensigns; for the same stress of fortune which makes it necessary to adopt any given measures, makes it necessary to support them when adopted.

Again, not only slaves, but those also about whose status there is a dispute, are prohibited during that time to assume the title of soldier, even though they may be in reality free. So also free-born persons who are in good faith detained in slavery (*qui bona fide serviunt*), and ransomed prisoners before paying off their ransom-price, may not be

To Timothy.  
c. 5 [and c. statim?]  
C. 23, qu. 8.

c. 24, X, 5, 12, and  
gloss on c. 47,  
C. 7, qu. 1.

Cod. 12, 33, 3; and  
11, 48, 18.  
Cod. 11, 48, 7.

Cod. 11, 63, 4.

Cod. 12, 5, 2.

Dig. 49, 16, 11.

Plin., Epist., bk. 10

Cod. 12, 33, 7.

Livy, bk. 22.

Livy, bk. 22.

Dig. 49, 16, 8. received as soldiers. We read, further, how in days gone by the Roman people took great heed that there should be no need for generals to administer the oath of service to the lowest class of citizen (*capite censos*), whose excessive poverty laid them open to suspicion, and so public arms were not intrusted to this class; and Caius Marius was the first to break this usage, confirmed as it was by long continuance, and to admit one of this class as a soldier.

Val. Max., bk. 2, ch. 3. [7] Further, those liable to a capital charge who voluntarily enlist Dig. 49, 16, 4, 5. are capitally punished; similarly with those who have been given to beasts or deported to an island, and who enlist or conceal the facts when Dig. 49, 16, 4: 1 and 2. levied. But if one enlists who has been deported for a time only, and that time has now elapsed, the nature of his condemnation must be inquired into (so Arrius Menander ruled), so that if it involves perpetual infamy he may be discharged from his military oath; otherwise he is Dig. 49, 16, 4, 4. not prohibited from enlisting and seeking the honors of military service. He again who has compounded the adultery of his wife is ordered to be Dig. 48, 5, 12. discharged from his oath and deported. Yet, nevertheless, after the defeat of Cannæ, the dictator Marcus Junius, inasmuch as there was a dearth of soldiers of the proper class of citizen, decreed that if any of those who had ventured on capital crime or who were in chains as judgment-debtors would serve under him as soldiers he would order their release from their liability or their debt.

Livy, bk. 23. [8, 9] Furthermore, heretics are forbidden to enlist and all who Cod. 1, 5, 8. are suffering under *infamia*. Therefore those affected with ignominy Dig. 3, 2, 2, 3. are not to be admitted as soldiers. Also, no one can assume the quality Dig. 49, 16, 6. of armed soldier in order to evade the obligation to hold civil office; Cod. 12, 33, 2. and he who has sought a soldier's position in order to escape a lawsuit should be discharged from his oath on the application of his opponent. Cod. 12, 33, 1. So also one who has enlisted through fear of a criminal charge, with Dig. 49, 16, 4, 8. which he is threatened, must promptly be discharged from his oath. No Dig. 49, 16, 16. vagrant and no veteran soldier ought to be admitted as a recruit. He, Cod. 12, 43, 1. too, must be judged unworthy of a soldier's position who has brought Dig. 37, 15, 3. a criminal charge against his parents who reared him.

[10] Further, those so crippled as to be unfit for military service Dig. 49, 16, 4, 12. are not to be received as soldiers—not to be included in this list is the man born with only one testicle or who has lost one, for he may lawfully enlist, according to the rescript of Trajan. The generals Sylla and Dig. 49, 16, 4, pr. Cotta are remembered to have been naturally of that build: and we read also that the eunuch Narses was appointed by Justinian to the command of his army, and it was he who put an end to the war with the Ostrogoths in Italy; and a man with only one testicle is not either diseased or Dig. 21, 1, 6, 2. blemished, seeing that he can procreate. And Cyrus had eunuchs as his bodyguards, thinking that they would show more devotion to duty and be a more reliable protection as being beyond the temptations of lust.

[11] Again, soldiers are forbidden to carry on agriculture or trading or any other business lest their proficiency in arms should suffer by their attention to other occupations. For, as Plato laid down in the *Republic*, it is fitting for different individuals to practice different arts. Cod. 12, 37. Dig. 49, 16, 12, 1. Cod. 12, 35, 13; and 31, end. Wherefore, too, a soldier may not purchase land in a province lest his attention to agriculture should lead to neglect of his military duties. Cod. 12, 35, 31.

[12, 13] Hence, too, no one may have two military positions of different kinds at the same time, or a civil office and a military position. Cod. 12, 33, 5. And for the same reason a soldier may not be an agent, not even for his father or mother or wife, but only in his own interests (*procurator in rem suam*). And a soldier can not sue in respect of property which he asserts to have been given to him, when the gift has been made with intent to alter the parties to a suit (*judicii mutandi causa*); but it is the former owner who must bring the action, lest it seem that a lawsuit rather than a bit of property has been made over to the soldier. Cod. 2, 12: 7 and 9. Dig. 4, 7, 11. Cod. 2, 13, 2. Lastly, a soldier is forbidden to act as accuser, except in cases of treason and of outrage on himself or his family. Dig. 48, 2, 8. Dig. 48, 4, 7. Cod. 9, 1, 8. Nov. 116. And Justinian enacted that those who involved soldiers in private business and withdrew them from the State's business were to be punished by having their property sold up.

[14] It now remains to say something about the age for soldiering. It is known that the Romans would hardly ever have any one enlisted as a recruit who was less than seventeen or more than forty-six years old, and this dates from the ancient census-arrangements of Servius Tullius and was subsequently secured by a *lex sacrata* under Caius Gracchus. At the time, however, when the Romans were sore pressed in their war against Veii, a levy was made, and not only were younger persons enlisted (Livy tells us), but older persons also were compelled to give in their names to do service as city-guards. This was by the orders of Camillus. Plutarch, Life of Gracchus. Bks. 5 and 6.

On another occasion, after the defeat at Cannæ, the dictator Decius\* Junius enrolled persons of less than seventeen years, nay mere boys, and those over sixteen who did not take part in that war were officially censured. But Phocion, with intent to lessen the ardor for war of the overbellicose Athenians, by means of a rigid levy, not only summoned the young men but compelled even octogenarians who had served their term to give in their names. There is extant, however, a constitution of the Emperor Frederick dealing with the judicial combat, which says that one over sixty or under twenty-five is not bound to fight in person. Livy, bk. 22. Feud. Law: ii, 47. Sacred history also tells us that the Lord ordered Moses to enroll all Israelites Numb. 1. over twenty years of age, and this was the age which Plato thought the fittest for military service. With this in view, the precept is wise that if you have no veterans you must seek young recruits.

\* Thus in original, but should be Marcus. See page 186.

[15] Now a small band of trained veterans is far more valuable than untaught and inexperienced numbers who, when confronted by slaughter, are terrified by every trifle and think more about escape than about glory. And so Alexander, after the death of Philip, his father, overcame divers and countless hostile forces by means of the forty thousand veterans, well-trained and thoroughly experienced in the business of war, whom his father had left to him, and he reduced very many provinces of the world; and when the same man was about to lead his seasoned veterans against Darius, he exercised great care in his choice of recruits and thereby overthrew and put to flight a vast horde of Persians with his small band.

Veget., de re milit.,  
bk. 1, ch. 1.

It was the ancient practice, too, to judge by a man's habit of body whether he was fit for military service, with deep chest and erect carriage, whether he was brave and undaunted and what his appearance and vigor and bodily strength would be, so that the service of the State might employ such as were brave and faithful. And so Cato held that a fat soldier was of no use to the State, for everything between his gullet and his groin would be in the service of his belly.

[16] And sovereigns should be urged to employ as soldiers in war natives rather than foreigners, for the latter serve for pay rather than glory. This was the example set by Tullus Hostilius; for he had determined on war at a time when the Romans had had forty years of peace and leisure and exemption from war, and he scorned foreign auxiliaries, and summoned his own men only to war, and in a short time he turned them out first-rate soldiers by dint of discipline. For native guards are far the safest, and one's own arms are far more suitable than another's. Sacred history is taken to have shown this to us, for when David offered himself in single combat with Goliath the Philistine, and Saul, to increase his courage, would have put his own armor on him, David would not have it, on the ground that it would hamper him, but attacked with his own weapons only, namely, a sling and a staff, and laid his enemy low. Indeed, if a general desires, or is driven by necessity, to employ foreign auxiliaries at all, he must give especial heed not to place such confidence in them as that he has in his camp a smaller amount of native force and strength, lest there deservedly befall him what befell Cnæus Scipio in his war in Spain against Hasdrubal. For Hasdrubal noticed what a small force of Romans was in Cnæus Scipio's camp and how he was placing all his hope in the Celtiberi, and so he had secret interviews with the chieftains of the Celtiberi and bargained with them that, for a great reward, they would call off their forces and withdraw from the war, for there was no fear that the Romans would detain them, seeing that the Romans were so few in number. And Livy urges Roman generals to keep this example before them as a warning. Now, because the Emperor

1 Sam., ch. 15.

Bk. 25.

at Constantinople had no forces of his own, he summoned Turkish auxiliaries to protect him from his neighbors; but he could not get rid of them at the end of the war; and that is how the whole of Greece fell under the rule of Turkey.

I, therefore, do not approve of the policy of Cyrus, who declared that soldiers should not be selected out of citizens, but be brought from afar like the best horses, nor of that ancient custom of the Alexandrians, who would not allow of any but foreign soldiers. Much sounder was the Roman policy; for, in order to have an ample supply of native soldiers, they stipulated in their treaty with Antiochus that he should not hire soldiers or receive volunteers out of Roman dominions. And in the war with Pyrrhus, although the Romans had suffered two defeats, they nevertheless returned the auxiliaries who had been sent by the Carthaginians.

Livy, bk. 38.  
Appian, Syrian war.

Justin, bk. 18.

[17] Further, it is worthy of remark that the soldiers of Roman stock, right away from the foundation of their city for nearly three hundred and fifty years, served at their own cost and expense. For, during one part of the year they served in camp and during the other part they made provision for their children and wives and household gods and themselves and their household by agriculture and country tasks. But at the time when a declaration of war against Veii was under discussion, which war would involve a long and difficult siege and would have to be carried on throughout the winter, the Romans, taught by expediency and necessity, provided by a decree of the Senate for the payment of the soldiers out of funds publicly collected, although up to that time every one had performed his military duties at his own expense. Further, after the defeat at Cannæ there was such a determination to help the treasury-deficit that no knight and no centurion would take pay, and they employed the word "mercenaries" as a term of abuse for those who would take pay.

Livy, bk. 4.

Livy, bk. 24.

[18] Now Tacitus indicates that the pay of the Roman soldier was ten asses a day, when he says that during the Pannonian revolt the soldiers complained, among other things, that their bodies and souls were reckoned at ten asses a day each, and that for this sum they had to find dress, arms, and tents, and put up with the severity of the centurions and the absence of gifts; and so they claimed pay at the rate of a denarius each. It is clear from this that, although the denarius was originally reckoned at ten asses (and so bore the mint-stamp X), yet in course of time the value of the denarius was increased. And so, during the dictatorship of Quintus Fabius Maximus, when Hannibal was bearing hard on the State, Pliny writes that the exchange-value of the denarius was sixteen asses; yet he asserts that for the purposes of a soldier's pay a denarius was always given for ten asses. But the prætorian cohorts received two denarii each. If, however, we compare this denarius with the

Annals, from death of Aug., bk. 1.

Bk. 33, ch. 3.

Tac. Annals, bk. 1.

De veter. col. num.,  
 ch. 2. Hornan. in  
 Nomencl. rei num.

money of our day in weight and value, Covarruvias clearly proves that it was almost equal to the Spanish real, after Endæus and others; so that the pay of our soldiers is not at all or very little different from that

Alc. on Tac. of the Roman soldier.

But what the amount of the pay of Roman cavalry was, is not quite clear, except for the fact that public horses were assigned to them and that in the division of booty they sometimes had three times, and sometimes twice, as much as the infantry. And so, out of the booty taken by Lucius Æmilius Paulus, after the defeat of Perseus, each foot-soldier

Bk. 55. (Livy tells us) got a hundred, each centurion twice as much, each horse-soldier three times—on which some found a conjecture as to the pay of a

Bk. 55. horse-soldier. But in another place the same writer tells us that there was so much booty from the Epirote cities, which had defected to Perseus, that four hundred denarii apiece were divided among the horse-soldiers and two hundred apiece among the foot-soldiers. And so I dare not make any definite statement on this matter. But it is quite clear that the cavalry were held in highest honor among the Romans.

CHAPTER V.  
*Of the military oath.*

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| 1. One who was not enrolled with the military oath could not be a soldier.<br>2. How it was usual to take the oath.<br>3. Various formulas of the oath. |  | 4. Nature of oath among Lacedæmonians.<br>5. The ceremonials of the Samnite oath.<br>6. The oath taken by Athenians on reaching puberty. |
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[1] Among the Romans no one was allowed to be a soldier or attack the enemy with a sword who had not been enrolled with the accompaniment of the military oath; and it was just as much a military offense for one who had not been enrolled with an oath to kill an enemy as for one to commit an outrage upon a fellow-citizen or an ally. And so, when Pompilius—or, as others read, Paulus Æmilius—discharged one legion, and with it a son of Cato also who was serving in it, and Cato's son remained in the army because of his martial ardor, Cato wrote to Pompilius that if his son obtained leave to remain in the army, he must a second time be bound by the military oath, because, as the first oath had ceased to operate, he could not rightly fight with the enemy. And to his son, Cato wrote that he must be careful to keep out of the way of fighting, it not being right for one who was not a soldier to fight with the enemy.

Cic., Offic., bk. 1.

[2] In earlier days the cavalry squadrons and the infantry by centuries voluntarily pledged their oaths with each other. Then later, in the consulship of Æmilius and Terentius Varro, for the first time and never previously, the soldiers were compelled by the military tribunes to take a statutory oath instead of a voluntary one. The commander was bound to take this oath first, then according to rank there followed the legates, then the tribunes, then the centurions, after them the decurions and then the camp-prefects, and last of all the private soldiers. This oath was taken afresh each year on the first of January.

[3] It was a solemn oath in which the takers swore by the gods that they would assemble at the consul's command and not disband without it; that they would not depart for flight or for fear, nor leave the ranks except to bring or seek weapons or to assault the enemy or to succor a comrade.

But in later times, as Vegetius says, the soldiers swore by God and Christ and the Holy Ghost and by the majesty of the Emperor (to whom, says he, fidelity and devotion are due as if to God in the body) that they would diligently perform all the Emperor's commands, would

De re milit., ch. 5.

never desert the colors, nor refuse death for the Roman State. But sometimes when a great battle was expected, and at times of grave crisis, the troops would swear (so we read) that they would never return to camp except after the defeat, rout, and overthrow of the enemy. This was done in the consulship of Marcus Fabius and Cnæus Manlius, in the war against the Veii and Etruscans, for the consuls abode in the camp and would not trust the troops with arms (because in the year before, through disaffection to the consul Cæso Fabius, the infantry refused to follow up the enemy after his rout by their cavalry and returned to the camp without the command of the consul). Then Marcus Flavoleius, in his ardor for battle, took the initiative and said, "As victor, Marcus Fabius, I will return from the battle-line"; should he play false, he invokes Jupiter the father, Mars Gradivus and the other gods. After that the whole army, one by one, made the same invocation.

Livy, bk. 2.

In the same way, when Pompey halted near Dyrrhachium and ordered the camp to be pitched and the army was in great alarm, Labienus, in order to reassure it, set the example and swore that he would not desert Pompey but would share the same chance, whatever fortune might have in store for him; the other legates did the same; the military tribunes and the centurions followed, and the whole army took the same oath. And when Pompey decided to engage Cæsar in battle, the same Labienus was again the first to swear that he would not return to camp except as victor and he urged the others to do the same; so Pompey, approving this, took the same oath and there was none of the others who hesitated to take it. Petreius, too, Pompey's legate, exacted from all his men, when they were in communication with one another about a proposed defection to Cæsar, an oath that they would not desert the army and its leaders, nor betray it, nor make schemes for themselves apart from the others. And the commander-in-chief himself took an oath in those words and compelled Afranius to take the same; then followed the military tribunes and centurions: and the men, led out by centuries, took the same oath. Now Alexander's soldiers used to swear in his own words, he taking that oath first, that they would have the same enemies and the same friends as he had.

Caes., Civil war, bk. 3.

Caes., Civil war, bk. 3.

Caes., Civil war, bk. 1.

Quint. Curt., bk. 7.

[4] This too was the oath which the soldiers were wont to take among the Lacedæmonians, namely, that they would have the same enemies and the same friends as their general, so that there might be one firm agreement and federation between them for woe or for weal.

[5] But the Samnites, at times of great crisis, used to hold a levy with the accompaniment of the same ancient oath-ritual as on the initiation of recruits, and after a sacrifice had been offered in solemn fashion the general bade an official summon all the noblest in family or in exploit and, while the centurions stood around with drawn swords, the

soldier was approached to the altar rather as a victim than as a sharer in the sacred rite, and he was bound by an oath not to publish what was there seen and heard and then he was made, in a weird incantation, to devote to eternal destruction himself, his family and his stock should he refuse to go in battle whither his generals led him or should he himself flee from the battle-line or see another flee and not straightway slay him; and those who refused to take that oath were cut in pieces before the altar and, lying there among the carnage of the sacrifice, were a lesson to the rest not to refuse.

Livy, bk. 10.

[6] Now it appears in Æschines that the oath taken by the Athenians, on reaching puberty, was such as this: "My consecrated weapons I will in no manner handle with dishonor; whatever comrade may be mine in the battle-array, him I will not desert in danger; for our hearths and altars, alone or with others, I will strenuously fight; my fatherland, such and as great as I have found it, neither lesser nor worse, but greater and better, will I leave it."

It is a traditional story, too, that the Athenians, by reason of daily disagreements and breaches of the Law of Nations, developed bitter hatred and enmity towards the men of Megara, and that, whenever they bound their soldiers by the customary military oath, they made them also swear that every year during their term of military service, by whatever means they could, they would invade the lands and territory of Megara with a hostile army and would lay the country waste, not leaving anything intact, and would bring upon it all possible disaster of war.

It is, further, worthy of remark that when the whole Roman army took an oath to the consul, it sufficed if the centurion or tribune, on behalf of the army, swore in a set form of words with uplifted voice, and the whole array and each individual soldier with a common accord and assent took a silent vow in the same words, and this was just as binding as if each individual had said the set form of words aloud, and it was deemed sacred and inviolable.

It must also not be omitted that the tribunes were wont, on arriving where a camp was pitched, to exact from all in the camp, free as well as slaves, and individually, an oath that they would not steal anything from the camp—nay, further, that if they found anything whatever they would bring it to the tribunes.

Polybius on  
Roman Camps.

## CHAPTER VI.

### Of discharge.

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| <ol style="list-style-type: none"> <li>1. One once enrolled as a soldier can not be removed from the roll.</li> <li>2. A soldier may not quit the colors.</li> <li>3. Three kinds of discharge.</li> <li>4. Honorable discharge.</li> <li>5. Discharge invalidated.</li> </ol> | <ol style="list-style-type: none"> <li>6. Ignominious discharge.</li> <li>7. Ignominy not the same as infamy.</li> <li>8. Who can be discharged with ignominy.</li> <li>9. A fourth kind of discharge.</li> <li>10. The general alone can grant a discharge.</li> </ol> |
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[1, 2] When once a man has been enrolled as a soldier he can not, against his will, be removed from the roll unless he has been cashiered for unworthy conduct; for by a military *lex sacrata*, introduced in the dictatorship of Marcus Valerius Corvinus, no one who had been enrolled as a soldier might be removed from the roll without his consent. Nor might a soldier absent himself from the colors, or abandon his service, until he was discharged from his oath.

Livy, bk. 7.

Dig. 4, 6, 45.  
 Dig. 49, 16, 5.  
 Dig. 49, 16, 13, 3;  
 and 3, 2, 2.

[3, 4] Now there were three kinds of discharge and methods of releasing a soldier from his oath—the honorable, the invalidated (*causaria*, for good cause), and the ignominious.

An honorable discharge was given when the full term had been served and all the profits attending a discharge had been earned. It carried with it exemption from office-holding. On this occasion it was usual to dedicate shield, sword, and armor to the Lares (i. e., tutelar deities), just as gladiators do to Hercules, because by the aid of the immortal gods the soldier had completed his service and received his staff of discharge. The period for this discharge was on attaining the fiftieth year: Augustus, however, allowed those over forty-five, who did not wish to continue in the cavalry, the privilege of returning their horse and of obtaining a dismissal, as if after a completed term. Others were of opinion that no one could claim discharge until after ten years' service. By the Roman custom, however, the military oath was released at the end of the eleventh year and, when that had elapsed, a discharge was granted to those who had served their term. Later, the end of military service was put at the sixteenth year of service, and the Emperor Tiberius extended it to the twentieth year, and enacted that no discharge could be obtained before then; and this agrees with our rule. And one so discharged is exempt from all civilian offices and enjoys very many privileges.

Dig. 27, 1, 8.

Cod. 10, 55, 3.

Dig. 27, 1, 8  
 and Cod. 10, 55, 2.

[5] Now a discharge is said to be "invalided" when a soldier is reported unfit for service by reason of age or bad health or some bodily weakness. This kind of discharge is not easily obtained, and only after

a physician's report and after a careful examination of the defect by an expert. When it has once been granted, the rule is not to allow the discharged soldier to be re-enrolled on the allegation that his health has been restored; but, whatever the ground of his discharge may have been, he can not be re-admitted to the army without an order of the prince. A soldier discharged on these grounds will also obtain exemption from office-holding, but not a perpetual exemption, and he does not enjoy those privileges which those enjoy who have been discharged after a completed term; he will, however, enjoy the other privileges of veterans and will receive the rewards granted to a veteran. Now this discharge invalidated casts not the smallest stain on the reputation, and it is also an honorable variety of discharge. Those so discharged are called invalids (*causarii*) by Livy in the passage, "Let a third army be raised by Titus Quintius out of the invalids (*causarii*) and older men, to guard the city-walls."

[6] But an ignominious discharge, also called shameful (*probrosa*), occurs when a soldier is discharged from his oath on the ground of wrong-doing or crime; and a soldier so discharged is, according to the prætor's edict, to be infamous, and is disqualified for any dignity, and he may not reside in the city nor anywhere else where the emperor is. In fact one so discharged without mention of ignominy is nevertheless taken to have been discharged with ignominy, according to Macer. Ulpian, however, holds that the ground of the ignominy ought to be stated in the discharge. But in the case of those temporarily discharged, the infamy does not continue after the lapse of the time named.

[7] It should be pointed out, too, that there is a difference between ignominy and infamy, as is abundantly clear from Cicero, who says that a censor's mark of blame is not as grave a matter as a judgment of a court; for the censor's rebuke entails little more for the guilty party than a blush and a mark of ignominy, which is little more than nominal, and dignities are still open to the man who has such a mark, and access to the Senate, too. But it is quite different with those who have been found guilty by a court. They are perpetually barred all honor and dignity, and receive the mark of infamy, which can not be imposed save upon a judgment. Accordingly, those soldiers who had been discharged with ignominy were at one time not infamous, until the prætor's edict declared that they should become infamous. And so, that may be styled ignominy which our commentators call infamy in point of fact, while that is infamy proper which they call infamy in point of law.

[8] It should not be forgotten, too, that not only a common soldier, but a centurion too, and a tribune, nay, any one holding command in an army, even though enjoying the distinctions of a consul, may be discharged by a general with ignominy, and that one so discharged suffers the mark of infamy. And so Caius Cæsar dismissed Caius Anienus,

the tribune of the tenth legion, with infamy in the presence of the army, in the following words:

“ Caius Anienus, because in Italy you stirred up the soldiers of the Roman people against the republic, and made plundering expeditions into the townships, and have been of no use to me or to the State, and have caused the State a shortage of troops in a time of necessity, for these reasons, I remove you from my army with ignominy and I order you to leave Africa and to betake yourself as much farther as you can.”

Ant. Her.,  
Span. war, bk. 5.

[9] Besides these three kinds of discharge which we have described, Ulpian adds a fourth: If a man has enlisted in order to escape civil office-holding he is ordered to be dismissed; but this discharge does not affect his reputation.

Dig. 3, 2, 2, 2.

Dig. 3, 2, 2, 2; and

49, 16, 4, 8.

Dig. 3, 2, 2, 2; and

49, 16, 4, 8, end.

[10] Further, the general or commander of the army can alone grant a discharge. And so the censor Quintus Fulvius removed from the Senate his brother Fulvius for daring to discharge home, without the consul's orders, a cohort of the legion in which he was military tribune.

Dig. 3, 2, 1.

Val. Max., bk. 2, ch. 7.

## CHAPTER VII.

## Of the privileges of soldiers.

1. A soldier may not be thrown into prison for debt.
2. Whether nobles have the same privilege.
3. The privilege of not being sued beyond the limits of competence, its nature.
4. The property of an absent soldier may not be assigned to creditors.
5. A soldier is excused from being tutor and from giving evidence.
6. A soldier's property not liable to confiscation for non-payment of taxes.
7. Things bought with a soldier's money belong to him.
8. When a soldier sues for the recovery of money paid by mistake, the burden of proof is on the defendant.
9. A soldier may plead ignorance of law.
10. But not in case of delict.
11. A soldier not liable to torture or to the punishments of plebeians.
12. Military service does not release a son from paternal power.
13. A soldier son-in-power is reckoned independent of his father as regards *peculium castrense*.
14. What *peculium castrense* consists of.
15. Of soldiers' wills.
16. One capitally condemned for a military offense can make a will.
17. The goods of a soldier who leaves no successor pass to his legion.
18. A soldier who ill-advisedly enters on an inheritance is not liable beyond the assets.
19. He can not make a gift to his concubine.
20. A soldier who dies in battle is deemed to be still living.
21. A soldier who has died in battle counts towards his father's *jus trium liberorum* (privilege of three children).
22. Soldiers' privileges are not extended to the hurt of others.
23. Rewards owed to soldiers who have died are given to their children.
24. Soldiers' privileges are only granted to such as are strenuous in their military service.
25. Certain soldiers' privileges are not confined to soldiers, but are granted to others also who are camp-followers.
26. Women camp-followers, what privileges they may have.
27. Whether soldiers of the present day enjoy soldiers' privileges.

Seeing that, as Cicero truly says, honor fosters the arts and we are all spurred on by the desire of glory, while those pursuits are neglected which are generally despised, the Romans (who attained such a pre-eminent pitch of glory in war) acted with wisdom, undoubtedly, in holding the military profession in high honor; and they, accordingly, granted numerous very ample privileges to soldiers, the heads of which—and, for brevity's sake, the heads only—we will here just touch on. Tusc. Quest., bk. 1.

[1] In the first place, a soldier can not be imprisoned for debt, nor be sued save within the limits of competence; this was a provision of Egyptian law also. Action can not be brought against him, I say, save within the limits of competence; that is (as Justinian says), within the limits of what he can afford to pay, heed being given that he is not reduced to need thereby. And so, according to the common opinion, he is not bound to make cession of goods as an insolvent. Many, however, hold that this is only so if the debt has been contracted in camp or in connection with his military profession: the matter is doubtful. Certainly the privilege in question can not be renounced for it inheres in the person and not in the contract. Dig. 42, 1, 6 and 18.  
Diod. Sicul., bk. 2.  
Instit. 4, 6, 36.  
Dig. 50, 17, 173.  
Dig. 42, 1, 6 and Bald. thereon.  
Cod. 7, 71, 1, at end.  
Alex., col. 5, on Dig. 28, 6, 15.  
Dig. 24, 3, 141 and Alex. thereon.  
Dec. on Dig. 50, 17, 28, n. 8.

Gloss. and doctors on Dig. 42, 1, 6 and text in Cod. 6, 21, 18. Cod. 4, 28, 7.

[2] Many hold that this privilege attaches also to those who have

received a grant of nobility: and even if there may be a doubt on this point in common law, it has been so settled by a royal ordinance of Spain for those who are styled hidalgos. But neither by the common nor by Spanish law have these nobles any privilege not to be sued beyond their competence, for that is nowhere laid down, but only the privilege not to be imprisoned for debt. But the armor, chargers, and residences of these nobles can not be seized or taken in execution of a judgment except for a crown debt. By common law, too, the arms of soldiers can not be seized in execution of a judgment and this is sound, for the ancients used to call arms the limbs of soldiers. Nor ought execution to be levied on the pay of soldiers if the creditor can obtain satisfaction elsewhere.

Span. Ordin., bk. 3, ch. 5, tit. 2 and bk. 4, ord. Span. Ordin., bk. 24, with additional titles and 21, part 2.

Cod. 7, 53, 4.

[3] It must be remarked that that privilege of not being sued beyond the limits of competence does not affect the obligation nor the right of action nor the decision, for the plaintiff can sue for the whole amount; but the judge will only condemn within the limits of the defendant's competence, and even if the judge in error condemns in the whole amount the plaintiff will not obtain execution for more than the defendant can afford to pay; and the time to be regarded in this connection is the time of enforcement of the judgment; and so, although the defendant was able to pay at the time of the judge's sentence, he will nevertheless be able to plead this privilege.

Dig. 24, 3, 12.  
Dig. 42, 1, 41.  
Dig. 24, 3, 15.  
Dig. 17, 2, 63, 7.

Further, in favor of military service, sometimes not only soldiers, but those also who are desirous of becoming soldiers, have been released from imprisonment; for the consul Publius Servilius issued an edict, at the time when the Volscians were making war, that no one should detain a Roman citizen in fetters or under restraint so as to prevent him enrolling his name in the consul's lists; and, at a later day the dictator Marcus Junius, after the defeat of Cannæ, declared by edict that he would order the release from liability or from debt even of those who had dared to commit a fraud involving capital liability, and of all imprisoned judgment debtors, if they would take service as soldiers under him.

Livy, bk. 2.  
Livy, bk. 23.

[4] Very much like the foregoing first-mentioned rule is that whereby, if a soldier absent on State service has rendered his goods liable to seizure in execution by his creditors, through having failed to enter an appearance, yet the goods will not be so assigned to his creditors. And if the creditors of a soldier have sold up any of his property under the law of distress, the soldier is entitled to be restored to his former position (*restitutio in integrum*) on discharge of the debt or on proffering the price at which the property was sold, should that have been less than the value of the property; for a soldier who is in any way damaged while performing his duties to the State is entitled to *restitutio in integrum*. And so the consul Publius Servilius declared, during the Volscian war, that none should seize or sell up the property of a soldier who was on service.

Cod. 2, 50, 4.  
Cod. 8, 33, 2.  
Cod. 2, 50, 6.  
Cod. 2, 50, in general.  
Livy, bk. 1.

[5, 6] Again, a soldier is excused from tutorship and other public duties; and he can not be compelled to give evidence if he wishes not to, lest private advantage should entail his absence from the colors where he is the guardian of the whole State. And so, though a soldier is not exempt from taxation yet his property will not be confiscated for non-proffer or non-payment of taxes.

[7, 8] And although things do not necessarily become my property because they are bought with my money, yet if they are bought with a soldier's money he can bring action for them as owner. And although in an action to recover money paid by mistake the burden of proof is on the plaintiff, yet a soldier-plaintiff is freed from this burden and it is thrown on the defendant, who must show that he had a good title to receive the payment—this is so, however, only when the soldier claims that the whole amount paid was not owing and not if his claim relates to a part only.

[9, 10] Another privilege of a soldier is that he is not prejudicially affected by ignorance of law, for it is his business to understand arms rather than laws. And so a soldier who, e. g., through ignorance of law, does not utilize some peremptory plea which is open to him, is allowed to resort to it even after sentence given. This is a provision also of the laws of Spain. In case of delict, however, ignorance of law is no excuse, for we learn by nature the obligation to abstain from delict.

[11] A soldier is further favored in not being subjected to torture or to any punishment of plebeians, and this is so even after he has received his discharge after a full term of service; and so he can not be condemned to the beasts or the gallows. The constitutions of Spain contain a similar provision in the case of nobles. And it applies, also, to the sons of soldiers and of veterans, aye, and to the grandsons, too, of such as have attained the highest military rank. But this privilege does not extend to cases of high treason, treachery, sorcery, forgery, or private-prison-keeping.

[12, 13] Further, although military service does not release a son from paternal power, yet a soldier son-in-power is treated as independent (*sui juris*) so far as \* *castrense peculium* is concerned; to this his father has no claim. So far does this go that an action may lie between a father and his soldier son-in-power in connection with the *castrense peculium*, though in other circumstances no suit can be maintained between them. On this principle a soldier son-in-power can not plead the *senatus consultum Macedonianum* no matter what the purpose was for which he borrowed the money. Hence, too, although there can not be a gift between father and son-in-power, yet a gift made by a father to his son-in-power, on some consideration of military service, is valid and what is given forms part of the *castrense peculium*, and for the same reason a gift between spouses on the same consideration, though it would otherwise be revocable, is valid.

\* See Section 14, below, for meaning of this.

[14] Now, whatever a soldier has acquired in connection with his military service is reckoned *castrense peculium*. Even the succession to his wife, which she has bequeathed to him in appreciation of his military service, will, by a rescript of the Emperor Hadrian, be his, although he be under power of his father, as *castrense peculium*. This is not the case, however, with a dowry (*dos*) given or promised to the husband, for it is inseparably connected with the obligations arising from the marriage and passes to their joint children, who are in the grandfather's power. The inheritance of a brother on the father's side, or other comrade, which is offered to him as such comrade, is considered to be *peculium castrense*; this is only the case if they have been on military service in the same province or if the bequest be made in consideration of his military service, and not otherwise.

[15] Further, in reference to the wills of soldiers, such liberal treatment is allowed them in will-making that the solemnities of will-making are entirely dispensed with in their case. For the Emperor Trajan allowed soldiers to make wills in whatever form they chose, and declared that a bare declaration of intention sufficed. Papinian accordingly gave the opinion that a soldier's intention was his testament. But this is only true if the act of testation occurs while they are on an expedition; and, if two witnesses have been summoned thereto, the intention of the soldier may be proved in that way. This was introduced in favor of soldiers. But if the testamentary act occurs in the course of a battle, the will is valid, even without the summoning of witnesses, and it is enough for the soldier to have written the name of his heir on his shield or in the dust. And outside the exigencies of a campaign a soldier is bound by the common law when making his will: and this has been held to be also the law of Spain.

Now a will made on a campaign in accordance with this special law for soldiers will continue valid for a year after discharge. And the soldier is allowed such unfettered capacity to make his will as he likes, that he may die partly testate and partly intestate and can institute an heir up to a given date and thereafter take away the inheritance, giving it directly to another; and, if he has named no one, his statutory heirs will succeed. And the *jus accrescendi* (i. e., law whereby certain persons if not named as heirs may be added to those who are named as heirs) does not operate in the case of a soldier's will.

A soldier can also pass over his son in his will, and the mere passing him over will be taken as an implied disinheritance, provided he did it intentionally, and so also the agnation of a son after the making of a soldier's will does not avoid it, provided his intention be clear. And although in codicils an inheritance can not be directly bequeathed, yet it may in the case of a soldier's inheritance. A soldier, too, may make a will while uncertain about his status; and a will made in military fashion by a civilian is valid if he be a soldier at death.

Further, although the will of a civilian is not annulled by mere intent or by a mere attempt, not carried through, to make a subsequent will, yet the will of a soldier is annulled by mere intent without any difficulty. A soldier can even die leaving two valid wills. Further a soldier can give away more than three-fourths of his estate in legacies and these legacies suffer no abatement under the *lex Falcidia*. A soldier can make a valid will, although dumb or deaf. And a soldier son-in-power can dispose of his *castrense peculium* by will; and this applies even though he be in an unarmed branch of the service. And the wills of soldiers are not liable to impeachment as unduteous. And a soldier son-in-power will not only be able to make a will for himself, but also a will for his son by way of pupillary substitution, so far as regards his *castrense peculium*. But this testamentary privilege so granted to soldier sons-in-power must not be extended to those who are below puberty and have (as sometimes happens) been allowed to enlist as a special favor. Such a person will not be able to make a will either by common or by military law, because of the unstable character of that age. Herein Justinian corrected the ancient law so far as it allowed this.

Further, a civilian can not make a direct substitution to a stranger or his own son, over the age of puberty, whom he has instituted heir, in such a way that if he enters on the inheritance and shortly thereafter dies the substitute may become heir; but the only way in which this can be effected is by the testator binding his heir by a trust (*fidei commissum*) to pass on the whole or a part of the inheritance to the latter. A soldier, however, is allowed to do this in the first-mentioned way.

[16] Further, those who have been capitally condemned for military offenses may make wills of their *castrense peculium*, provided there has been no breach of the military vow and that the presiding judge gives permission in his judgment. This is not so in the case of a civilian.

[17] And if persons condemned for a military offense die intestate the next of kin will succeed, to the exclusion of the treasury. Indeed the property of a soldier who dies without leaving a successor is given to his legion and not to the fiscus.

[18] Lastly, a soldier who has unadvisedly entered on an inheritance is not liable beyond the assets of the inheritance.

[19] Again, the favor which is shown to soldiers does not always manifest itself in an extension of their testamentary capabilities, but sometimes also in a restriction of them. Accordingly, although it is allowable to bequeath or make a gift to a concubine or mistress, yet a soldier can not give or bequeath anything to a woman suspected of being of loose character. A disposition, also, which is disgraceful or immoral is no more valid when made by a soldier than when made by a civilian.

[20, 21] Add now to what has gone before the unique and glorious military privilege that when a soldier dies in war for the sake of

Dig. 29, 1: 15 (1 and 2).

Dig. 28, 3: 1 and 2.  
And 29, 1, 19, pr.Dig. 29, 1, 4 and  
Instit. 2, 11, 2.Instit. 2, 17, 7 and  
Dig. 28, 3, 2; and  
28, 1, 21, 1.Dig. 29, 1: 17, 4 and  
18. Cod. 6, 21, 12 and  
Dig. 35, 2, 1.

Dig. 29, 1, 11.

Dig. 5, 2, 32.

Cod. 3, 28, 24.

Dig. 29, 1: 20 and  
15, 4.

Dig. 27, 1, 8.

Cod. 6, 21, 18.

Instit. 2, 16, 9.

Dig. 28, 6, 15 and  
Cod. 6, 21, 6 and  
Dig. 29, 1, 5,  
and 29, 1, 41.Dig. 29, 1, 11,  
and 28, 3, 6, 6,  
Dig. 28, 1, 8, 1,  
and 4.

Dig. 38, 12, 1 and 2.

Dig. 28, 3, 6, 7 and  
Cod. 6, 62, 2.

Cod. 6, 30, 22 (end).

Dig. 39, 5: 5 and 1.

Dig. 29, 1, 41, 1; and  
34, 9, 14.  
Cod. 5, 16, 1.Dig. 32, 22, 1; and  
24, 1, 32, 8.

Dig. 29, 1, 29, 2.

his State he is taken as continuing to live through the glory of his exploits—only he must die in battle in actual fighting, and not even in a siege or in any other way simply connected with war; and so a soldier son-in-power who falls fighting in battle for his country counts towards the *jus trium liberorum* (i. e., three-children privilege) which excuses his father from tutorships and furnishes an excuse in the case of some other civil duties. Accordingly, when the *Lex Julia de maritandis ordinibus* (i. e., about the marriage of the different ranks) provided that that one of the consuls should have priority and have the right of carrying the *fasces* (i. e., the special emblem of the highest magistrates) who had more children in his power than his colleague had, those children were to be counted in, who had been lost in war.

[22] This privilege admits of many other applications; and so if a statute should provide (as is the case in many jurisdictions) that, in the succession to a father, a second son who survives his father is preferred to a grandson by the eldest son who predeceases the father, I am of opinion that, if his eldest son had fallen while fighting for the State, in this case the grandson is to be preferred, and for this reason, i. e., that his father (who is entitled to the grandfather's succession by the law of primogeniture) is deemed to be ever living; and in a precisely similar set of facts I have heard that the matter was so adjudged, notwithstanding the rule that soldiers' privileges are not to be extended to another person's injury and the rule that exceptions of an advantageous kind (*beneficia*) are not usually either extended or granted to another person's injury. These latter rules do not operate here, because no injury is done to the second son, seeing that it is not a case of something being taken from him, but only of something not being acquired by him. For (as Ulpian put it) persons are not reckoned as losing a thing which was never theirs and, as a rule of Paulus says, a man can not be held to cease to own what he has never owned. And that is the principle of Ulpian's dictum that no fraud is committed on creditors when the debtor omits to acquire something, but only when he diminishes the property which he actually has.

Now Papinian's pronouncement that soldiers' privileges are not to be extended to the injury of another person has no application to the case before us, for he is speaking of a case to which a soldier's privilege is not extended and in which it is clear that a wrong was being done to another. Accordingly I hold that in the case which we are discussing the grandson must be preferred to his uncle notwithstanding the statute—especially as, by common law, a grandson represents his dead father even when he has died otherwise than in war; and therefore, as the statute derogates from this common law, it ought to be restrictively interpreted.

[23] Add to the foregoing that a royal ordinance of Spain provides that any rewards which a man has earned for distinguished services

Dig. 27, 1, 18.  
Instit. 1, 25, pr.  
(middle).

Dig. 50, 5, 14.

Gellius, bk. 2, ch. 15.

Dig. 26, 7, 40.

Dig. 36, 1, 12.  
Cod. 8, 48, 4;  
and 1, 19, 7, 7.  
Dig. 8, 3, 17.

Dig. 50, 17, 83.

Dig. 50, 17, 208.

Dig. 50, 17, 134; and  
42, 8, 6, pr.

Dig. 26, 7, 40.

Instit. 3, 1, 6.

Panormit. on c. 10,  
X, 3, 30. Text in c. 1  
(end), X, 1, 17, bk.  
6 (?).

in the field are, on his death, to be due to his children and next of kin. It was the Roman rule, and enacted at Athens also by a law of Solon, that the children of those who had fallen in battle should be brought up and properly educated at the public expense. And Constantine added that the sons should be summoned to the military profession of their father.

[24] It is, further, to be remarked that these military privileges are only granted to soldiers if they are performing their service with bravery and zeal, and they are not extended to veterans, though they, too, have privileges of their own. But oarsmen and sailors of the fleet are "soldiers" and enjoy military privileges.

[25] And, besides, certain military privileges are granted not only to soldiers, but to others as camp-followers; and in the forefront is this, that those who are not of a rank which entitles them to military privileges in will-making will be allowed, if kept prisoners by the enemy, to make their wills in whatever way they like and can.

[26] So, also, women who are absent with their husbands on the military service of the State receive the same assistance as soldiers if they are deprived of some legal remedy by lapse of time. A rescript of Alexander is to that effect; and Diocletian and Maximinian issued a rescript that a woman absent with her husband on a campaign was not to be adversely affected by a prescription *longi temporis* (i. e., based on lapse of time).

On the same lines is Ulpian's opinion, that those who have been lost in war are to be counted for the purpose of providing excuse from tutorship, of whatever sex or age they may be, provided they died in battle—for it is quite clear in ancient histories that women used to serve in array of battle and have sometimes rendered highly distinguished services in war. Thus in the Sabine war, the Sabine women at Rome, on whose account the war broke out, had the hardihood to throw themselves by a sideways movement among the flying missiles, their hair streaming, their gowns rent, for their womanly fear (as Livy says) was overborne by their sufferings, and they thus succeeded in composing the anger and hostility of the opposed forces. And that, too, is a memorable thing that is told of the Cimbrian women whom, as well as their husbands, Marius had to fight in battle and whose death was even more glorious than their fighting, for when they failed to obtain their freedom by sending an embassy to Marius, they suffocated or strangled their children indiscriminately and either killed each the other or, making a rope of their hair, hanged themselves on trees or the shafts of wagons. And the German women are reported to have more than once restored their line of battle when it was breaking.

[27] Now, although many doubt whether soldiers of the present day enjoy these privileges, it is nevertheless the better opinion that those who are on the service-lists and are doing their service with bravery and

Span. Ordin., bk. 5, tit. 27, par. 5.

Cod. 12, 47, 1 and 2.

Dig. 49, 18; and 38, 12, 1 and 2.

Cod. 12, 46: 1, 2, 3, 4.

Instit. 2, 11, pr. (mid.). Dig. 27, 1, 8.

Dig. 29, 1, 44.

Cod. 2, 51, 1.

Cod. 2, 51, 2.

Bk. 1.

Florus, de gest., Rom., bk. 3, ch. 2.

Crinin., de honest. disc., bk. 12, ch. 8.

zeal are granted these privileges—at any rate such privileges as have not been abolished in practice, and it is immaterial that in their case the solemnities wherewith in olden days soldiers were enlisted, with an oath of military service, have been dispensed with. For we notice in our days an analogous disappearance of ancient solemnities in our actions at law, which are, none the less, of equal efficacy. The ground and reason for granting soldiers such ample privileges was that, being thus freed from all anxieties, they might devote themselves, unhampered, to arms for the safety and defense of the Roman dominion. This reason applies equally to our soldiers, and so the law ought to remain the same. This view has the approval of men of highest learning, too.

Dig. 1, 2, 2, 6.  
Cod. 2, 57, 1 and 2.

Dig. 3, 5, 46; and  
48, 1, 8.  
Cod. 2, 11, 15.

Cod. 2, 7, 14; and 2,  
12, 7 (end).

Dig. 29, 1, 1.

Cod. 4, 65, 31.

Jacob de Rauen.,  
Cyn, Bald., Bart.,  
Salicet and others on

Cod. 1, 18, 1.

Alb. on proc. Rom.

civil. 43, and consil.

506.

Alex. on Dig. 28, 6,

15, nu. 23. Decius on

Rubr. Cod. 6, 21,

mentioned by

Francisc. Zoannettus on

Roman Emp., nu. 80.

Dig. 9, 2, 32, pr.

## CHAPTER VIII.

### Of military courts.

- |                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. A soldier can not be sued save before his own judge:</li> <li>2. Except he be a deserter,</li> <li>3. Or has agreed to waive this right,</li> <li>4. Or has become a soldier after issue of the summons,</li> <li>5. Or has given perjured evidence,</li> </ol> | <ol style="list-style-type: none"> <li>6. Or is also engaged in trade.</li> <li>7. The Roman consuls only had power when on active service to punish a Roman citizen capitally without consulting the people.</li> <li>8. The tribunes had not power of life and death over the troops.</li> </ol> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

[1, 2] Soldiers can not be summoned before any but their own judge, or be punished by any other if in fault; and so, if arrested by a civil official, they ought to be remitted to their own judge, except in the case where a soldier while deserting commits some very serious offense, in which case the president of the province can take cognizance of the offense and punish the soldier in the place where it occurred. But otherwise a general or commander of troops has no jurisdiction over provincials and a provincial president none over soldiers.

Cod. 3, 13, 6; and  
9, 3, 1.  
Cod. 9, 3, 1.

Dig. 49, 16, 3.  
Cod. 3, 24, 1.  
Dig. 48, 2, 22; and  
48, 3, 9.  
Cod. 9, 24, 1.

[3, 4] If, however, a soldier shall have declared in a written instrument that he will waive the *præscriptio fori* (i. e., plea to the jurisdiction) which his profession entitles him to set up, the agreement must be adhered to. So, also, if a man becomes a soldier only after receipt of a summons, he is, as it were, anticipated and can not challenge the forum; for a lawsuit ought to be brought to a conclusion in the same circumstances in which it was begun.

Cod. 2, 3, 29.  
Dig. 5, 1, 7.

Dig. 5, 1, 30.

[5, 6] Further, a soldier who has given perjured evidence subjects himself to the jurisdiction of the judge concerned even though he be a civilian. A soldier, too, who is a trader, subjects himself thereby to the judge of that trade.

Cod. 4, 20, 14.  
Cod. 3, 13, 7.

Further, every one ought to answer in a military court regarding public matters which he carried through in the course of performing his military service and with regard to military accounts, and without being able to set up the *præscriptio fori*, and this although he has retired from the service; and a volunteer who is liable to capital accusation (and who, according to a rescript of the Emperor Trajan, is not exempt from capital punishment) should not be remitted to the place where the accusation is brought, but should be punished in the place where he ought to have been tried if the charge had been a military matter.

Cod. 3, 21, 2.

Dig. 49, 16, 4, 5.

[7] Further, it is to be remarked that, although consuls were prevented by the *Lex Valeria*, which Valerius Publicola introduced, and by

the *Lex Porcia*, from capitally punishing a Roman citizen without the command of the people, and although they were only left the power to order imprisonment and public chains, yet when on active service they had the right of inflicting punishment at their discretion; and this was also allowed to prætors and other commanders of troops. The jurists consult Venuleius, however, is of opinion that this was limited to the case of private soldiers, they being meaner and less regarded. Whence it may be inferred that such punishment could not be inflicted on others without reference to the emperor.

Dig. 1, 2, 2, 16.  
Dion. Halic., bk. 10.  
Polyb., bk. 6, de re  
milit. ac domest.  
Rom.

Livy, bks. 2 and 4  
Cicero, Philipp. 3.

Dig. 48, 3, 9. Nov. 74, § 4 (3).

[8] The tribunes, too, and others below the rank of general had no power of life and death over the troops, but were only allowed to inflict light punishment, as is clearly indicated by Marcianus, when he says that it was the business of the tribune to punish offenses within the limits of his authority. And what Tacitus says about the notorious Pannonian revolt is consistent herewith. He writes that Municius, the camp-prefect who had the chief command at the time owing to the general's absence, quieted that revolt in its beginnings by the execution of two soldiers—which was rather by way of salutary example than under any legally conferred authority.

Dig. 49, 16, 12 (end).  
Annals, bk. 1.

Further, the business of military courts can be conducted, according to a rescript of the Emperor Trajan, even on holidays.

Dig. 2, 12, 9.

## CHAPTER IX.

*Of the punishment of soldiers.*

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. Twofold reason for punishing offenses.</li> <li>2. Military punishments.</li> <li>3. Military offenses either individual or joint.</li> <li>4. <i>Fustuarium</i> (cudgeling), what it is.</li> <li>5. Decimation.</li> <li>6. Romans harsh in military punishments.</li> </ol> | <ol style="list-style-type: none"> <li>7. The capital penalty remitted where the offense is due to wine or passion.</li> <li>8. The Romans in their judgments did not balance good deeds against bad ones.</li> <li>9. The Persians did the opposite.</li> </ol> |
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[1] Plato, in his *Gorgias* (so Gellius tells us), opines that there is a twofold reason for punishing offenses: the one being the chastisement and correction of the offender, so as to make him more heedful and more ready to behave properly; this in the case of lesser offenses is ordinarily by a fine or some light restraint with a fine added; the other is by way of example, in order to deter others from similar offenses by the fear of punishment. And in the case of the graver offenses it is important that this should be inflicted publicly. Noct. Attic., bk. 6, ch. 14.

[2] And so some military punishments are of the graver order and are capital; others of the lighter order are necessarily inflicted by generals on delinquent soldiers in order to preserve military discipline, and vary according to the greater or less gravity of the offense.

[3] Now the offenses of soldiers are either individual or joint.

An individual military offense is one committed by a soldier as such, e. g., behaving otherwise than military discipline requires. Now military punishments, according to Modestinus, are as follows: Castigation, fine, imposition of tasks, change to an inferior kind of service, degradation, and ignominious discharge; but soldiers are not sent to the mines or tortured or condemned to the beasts or to the gallows, nor are they liable to any punishment of the plebeians. Dig. 49, 16, 2.  
Dig. 49, 16, 6.  
Dig. 49, 16, 3, 1.  
Dig. 49, 16: 3 (1) and 4.  
Dig. 48, 19, 9, 2.  
Cod. 9, 47, 5, and ch. on Soldiers' privileges, above.

Dig. 49, 16, 3, 15.

On Roman camps.

[4] But for a grave offense they may be capitally punished or cudgeled. The latter punishment was as follows, according to Polybius: the tribune took a cudgel and just touched the condemned man and thereupon all in the camp struck him with cudgels and stones, so that the victims were generally killed in the very camp, and if any one escaped it did not stand him in good stead, for he was not allowed to return to his country nor did any of his kinsmen dare to shelter him at home; and so those on whom this trouble fell were doomed to perish. This kind of punishment was called *fustuarium*, according to Cicero, who says, "The legions who abandoned the consul deserved *fustuarium*." A like kind of punishment is in vogue even at the present day on service. It is this Philipp. 3.

that the juriconsults are thinking of when they use the phrase "to be cudgeled, killed, punished"; but elsewhere, when they use the phrase "to be cudgeled, chastised, admonished," they are not thinking of the capital variety, but of the lighter punishment; for this latter punishment with the cudgel is much lighter than scourging, according to Marcellus, Callistratus, and Hermogenianus, and the annotations of Hieronymus Verrutius.

As in Dig. 9, 2, 7, 1,  
and 29, 5, 1, 17, and  
48, 19, 8, 1.

In Dig. 48, 19, 10.

In Dig. 48, 19, 28, 2.  
Dig. 47, 10, 45.  
De verb. signif.,  
bk. 6.

As in Dig. 1, 12, 1,  
10; and 47, 10, 45; and  
48, 19, 7; and 1, 15:  
3 (1) and 5; and 48, 19:  
10 and 28, 1; and 49,  
16, 3, 15. Cod.  
10, 59, 1

[5] Further, if several soldiers join together to commit some crime, or if a whole legion deserts, they are ordinarily cashiered. Sometimes the punishment was the very common one of binding the leaders of disturbances to a stake, or beheading them with an axe, and then choosing by lot one man in every ten of the rest and sending him to punishment. This can be gathered from the words of Cicero (*Pro Cluentio*) where he says: "Our ancestors laid it down that if a crime against military order was committed by several jointly, some were selected for punishment by lot, so that in that way fear might strike many, while the actual punishment struck but few."

Dig. 49, 16, 3  
(at end).

And among other military punishments were the following: to postpone the year's pay, and in such cases not to advance any pay so that those so punished were called "bankrupts" (*ære diruti*), or to reprimand in public in a general assembly or to dismiss without any advantages in the shape of pay; to forbid the place in which they rested to be reckoned in the camp, so that they lay on the ground and in the open; to leave them outside the camp-ditch without tents; to flog with vine twigs; to order them to give in their spears—and this punishment was called the punishment of the spear (*censio hastaria*), and generals did not usually inflict it by way of punishment for any small offense, but for some grave offense. Now soldiers were ordered to give in their spears whose spear was taken away from them by way of disgrace for some shameful conduct or riotous living; for just as brave soldiers who for the first time had come out of a battle victorious were presented with an unstained spear as a mark of glory, so the cowardly and contumacious were deprived of their spears. This was as much as to say that the hope of military service was taken from them.

Those were publicly reprimanded on parade who had their arms in rough condition and insufficiently polished or whose horses were overlean and scraggy, or who, on the day appointed for a battle, submitted over-reluctantly to orders and sought opportunities for shirking.

Alex. ab Alex.,  
Genial. dies, bk. 2,  
ch. 13.

Noctes Atticæ, bk.  
10, ch. 8.

There was also in olden times a military punishment which consisted in ordering a soldier's vein to be opened, by way of disgrace, and blood let: Aulus Gellius thinks that this was first employed in the case of soldiers of sluggish disposition, whose natural habit was altering for the worse (so that it did not seem to be so much a punishment as a medicine); but in later times it became, by use, a method constantly resorted

to in the case of numerous other offenses, as if to suggest that all delinquent soldiers were somewhat wanting in health.

[6] Now, although in other departments rather mild punishments commended themselves to the Romans, who had a rule in ancient times that a man was not to be fined an ox in preference to a sheep—the assessment of severer fines being one ox or more, but of lighter fines a sheep—yet as regards military punishments they were always on the severe side, inasmuch as military discipline calls for a harsh and severe kind of chastisement. Hence, although the consuls were forbidden to punish a Roman citizen capitally, yet on active service they could inflict punishment at discretion, as we have elsewhere said. Hence, also, it was very rare for the emperors to pardon a second offense. For, as Marcus Cato wrote in his treatise *De re militari*, mistakes made in other circumstances can be corrected afterwards, but offenses committed in war do not admit of being put right, seeing that the punishment itself follows on the heels of the mistake and there is an avenger of cowardice or clumsiness standing ready who never shows any indulgence to a delinquent enemy. And that consummate general Lysimachus used to say that a second mistake is not possible in war, for that is a place where blunders or heedlessness or ignorance can not be put right; for in war a little slip often produces the most serious results. Nevertheless, certain delicts when committed by a civilian call for no punishment, or perhaps, on the other hand, for a rather severe one, which, when committed by a soldier, call respectively for a rather severe or a rather light punishment (so Marcellus held). And it is well-known that certain military offenses are punished capitally, these all being acts such as can not be done except guiltily.

Above, on Military courts.

Dig. 48, 19, 14.

As in Dig. 49, 16: 6 (1) and 7, 8 and 14.

[7] The capital punishment is, however, remitted in the case of those who have erred through wine or in frolic. They are merely sentenced to a change to an inferior kind of service; for intention and deliberation are distinguishing marks of crime, but they are non-existent in a drunken man. Pyrrhus, accordingly, let some men go scot-free who, when drinking, had loaded him with abuse and curses, and who frankly admitted it, throwing all the blame on the liquor, and who even said they would have said things far worse if they had had more wine—aye, and would even have killed the king if the bottle had not given out. The Emperor Charles V, on the contrary, issued a decree that drunkenness was not to be any excuse for crime; this was due to the excessive frequency of drunkenness at that time. And Pittacus introduced a law providing that one who offended when drunk was to pay twice the fine which would be inflicted on a sober man.

Dig. 49, 16, 6, 7, at end.

Dig. 48, 8, 1.

Val. Max., bk. 5, ch. 1.

Plutarch, Banquet of the Seven Wise Men.

[8] It is, further, highly remarkable that the Romans, who elsewhere attached the highest importance to every man's merits and virtue, refused, nevertheless, to display on the judgment-seat any indulgence to

crime, even where most important services had been rendered to the State, or to balance good deeds against bad. The most conspicuous illustration of this is the case of Publius Horatius: though he wore, as victor, the threefold spoils of the Curiatii, and though his unaided valor had won their empire for the Roman people, he was charged with treason (*perduellio*) for stabbing his sister when she wept at the death of Curiatius, her betrothed. And he was in a highly critical position, from which he was rescued more by the entreaties and pathetic appeal of his father than

Livy, bk. 1. by his recent achievement.

And when Marcus Manlius Capitolinus was accused of aiming at kingly power, although his defense of the Capitol had saved Rome and although he led out into view nearly four hundred men to whom he had lent money without interest, thus preventing their property being sold up and themselves carried off as assigned debtors (*addicti*), and although, besides all this, he displayed to view the spoils of slain enemies and numerous gifts of commanders and had recalled his exploits in war in a speech, the greatness of which matched the greatness of his deeds, yet his

Bk. 6. crime (says Livy) outweighed all, and Manlius was condemned by the judgment of the people and was hurled from the Tarpeian rock.

[9] The Persians, on the other hand, never condemned a man unless he was convicted of having done more harm than good to the

Diod. Sicul., bk. 1. State.

## CHAPTER X.

*Of the contumacious and those who disobey the orders of their officers and who do not defend them.*

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| 1. He who disobeys a command is punished capitally.<br>2. A soldier who resists a tribune or centurion when proposing to chastise him.<br>3. A tribune may not overpass bounds in chastisement. | 4. Those who refuse to defend, or who desert, their superior officers.<br>5. He who does what his commander has forbidden.<br>6. Discipline of their camps more important to the Romans than love of children. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

[1] In order to establish military discipline, it is before all necessary that those who command the army or soldiers have their men obedient to orders. Accordingly, capital punishment is decreed for him who disobeys orders, and Augustus dismissed the whole of the tenth legion with ignominy when it was contumacious and disobedient. Dig. 49, 16, 3, 15.

Further, when Lucius Æmilius Paulus was despatched into Macedonia, he made it his first care to provide that in the movements of his army everything should be done in ordered fashion and without noise, at the first beck and command of the general. For, when proclamations of what was to be done were made to all at the same time, not every one heard them distinctly, and, as the orders were not received in clear form, some, making additions for themselves, did more than was ordered, while others did less, and dissonant shouts were raised in every quarter, insomuch that the enemy knew sooner than the soldiers themselves what was intended. The general, therefore, directed that the military tribune should communicate the order, secretly, to the chief centurion of the legion, then he to the next, and so on, each telling the next to him in rank what had to be done, whether the instructions were to be conveyed from front to rear or from rear to front.

Livy, bk. 34.

[2] Now we have elsewhere told how the tribune and the centurion have power of chastisement over the troops. A soldier, accordingly, who resisted the tribune or centurion when proposing to chastise him, was branded with the mark (*nota*) of disgrace, and this meant that no one might supply him with fire or have any dealings with him. But if he had laid hold of the vine-staff, he was put to inferior service; while if he had broken it intentionally, he was capitally punished. (We have elsewhere shown how vine-staves were carried before the tribunes, and not *fascēs*.) Dig. 49, 16, 13, 4.

Above, ch. on the Office of Tribune.

Dig. 49, 1, 12, end;  
and 19, 2, 13, 4. [3] A tribune must, however, give heed not to overpass due limits in chastisement; and should he assault a soldier without justification and not with any intention of chastisement for some offense, I think the soldier may lawfully defend himself; but in other cases resistance is unlawful. All contumacy towards the general or commander is a capital offense.

By inference from  
Cod. 10, 1, 5. c. 97, C. 11, qu. 3. Dig. 49, 16, 6, 2. Dig. 49, 16, 6, 1. [4] Again, capital punishment is decreed not only for those who have offered violence to their commander, but also for those who have neglected to defend him or who, though defending him, have allowed him to be killed; and a royal edict of Spain has decreed the same for those who desert their king. Now the Roman Senate treated it as a most serious matter that the soldiers had allowed the consul Petilius to be killed when he was bravely fighting against the Ligurians, and they refused to advance the year's pay or to make any other payments to the legion, because it had failed to offer itself to the enemy's weapons for the safety of their general. Indeed, the Celtiberi deemed it a sin to survive a battle in which the chieftain was killed, to whose safety they had dedicated their lives. And Cæsar tells how among the Gauls there were men bound by a similar obligation, whom they styled "soldurii."

Val. Max., bk. 2,  
ch. 7. Val. Max., bk. 2,  
ch. 6. Gallic war, bk. 3. [5] Again, so stringent is the rule requiring obedience to a commander's decrees and observance of his orders that capital punishment awaits him who does anything which his commander has forbidden or fails to carry out his commands, even though he meets with success therein. This discipline had very stern champions in Postumius and Tubertus and Manlius Torquatus. One of these men had his own victorious son beheaded for attacking the enemy with an escort, of his own motion and without any orders to do so, and this though he had routed the enemy. And another of them, whose *cognomen* (surname) thereafter was Imperiosus, had his son flogged in sight of the whole army and beheaded for accepting, against his father's orders, a challenge to combat given by Geminus Metius, the Tusculan general, and this although his descent into battle was crowned with a glorious victory and he had brought back magnificent spoils. And Manlius, the son, when the troops were on the point of rising in favor of him, insisted that he was not of sufficient value for discipline to be destroyed on his account and he induced them to allow his punishment to be carried out.

Livy, bks. 4 and 8.  
Val. Max., bk. 2,  
ch. 7. Gell., bk. 9, ch. 13. Dig. 49, 15, 19, 7. [6] And so Paulus says that the Romans gave the discipline of their camp priority over their love for their children. And the dictator Papyrius displayed no less severity towards his master of the horse, Quintus Fabius, for leading the troops out, contrary to orders, although he had returned to the camp after a signal defeat of the Samnites. The dictator was not moved by his valor nor by his success nor by his high birth, but had him stripped and flogged and persisted in demanding his execution from the Roman people, and from the tribunes of the plebs

who were interposing their veto on his behalf. It was, then, just as much a military offense to fight irregularly and contrary to orders, even after being challenged, or to be slow in obeying the trumpeter's signal to retreat, as to do an injury to a fellow-citizen or an ally. And Cyrus, accordingly, is said to have commended the soldier who, being just about to kill an enemy when he heard the signal for retreat, yet drew back his sword and restrained the blow and let the enemy go.

Livy, bk. 8.  
Val. Max., bk. 2,  
ch. 7.

## CHAPTER XI.

*Of truants.*

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| <p>1. A soldier may not be away from the colors without leave.</p> <p>2. A soldier who quits the ranks is flogged.</p> <p>3. A truant (<i>emansor</i>) and his punishment.</p> | <p>4. One who crosses over the ramparts.</p> <p>5. One who does not return on the day his furlough expires.</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|

[1, 2] It was provided by the military law of Rome that no soldier, unless he had permission, was to absent himself from the colors or quit a battle-field or abandon a post or flee from camp or go too far afield, and that the precautions of reconnoitering and watchwords and supports should not only be taken when marching in battle-array, but also when out collecting wood or making a foray; and, in a word, that all precautions and arrangements should then be taken as if in face of the enemy. But he who wanders outside the fortifications, out of hearing of the trumpet, unless it be by the orders of the general or tribune, is liable to military correction, the danger being that soldiers who are straggling along in loose order and carelessly may stumble into some hostile ground and be exposed to slaughter and other risks. And another reason for this is that they may be restrained from plunder. Hence one who quitted the ranks when on march was flogged or was put

to inferior service.

Lysander of Lacedæmon was once chastising a man who had left the line of march and, when the fellow said that he had not done so for any purpose of plunder, made answer, "But I mean you not even to look as if you were going plundering." And when Alexander Severus found any one turning aside to loot something or other, he had him flogged and ordered a herald to make proclamation during the chastisement, "Whatsoever ye would that men should do unto you, do ye even so unto them," a saying he had picked up from the Christians. And when Pompey was sent as legate into Sicily he heard that the men were in the habit of wandering off during the march and committing assaults and looting; so he checked their random roamings with punishments and affixed his seal to the swords of those who were sent on his errands.

Plut., Apoph.

[3] Further, one who makes off for some time without leave and then returns to the camp is called an *emansor* (truant). His offense is less heinous than that of a deserter, just as a slave with a habit of wandering is not so bad as a fugitive slave. And inquiry is made into the circumstances of his truancy—why the man went away and whither and

Dig. 49, 16, 3, 2.

Dig. 50, 1, 225.

what he did there, and pardon may be given where the reason was his health or his affection for his relatives by blood or marriage or where he was in pursuit of a fugitive slave or there was some other such explanation. Moreover, a recruit who has not yet learned military discipline is a fit subject for pardon.

Dig. 49, 16, 4 (end).

[4] When, however, an attack by the enemy is imminent, a soldier who stays away reconnoitering over long, or leaves the fosse, is punished capitally. So is he who crosses over the ramparts or enters the camp by climbing the wall, for walls have ever been held sacrosanct.

Dig. 49, 16, 3, 10.

Dig. 49, 16, 3, 15.  
Instit. 2, 1, 10.

[5] He, too, who has been allowed furlough and does not return on the appointed day is to be treated (so Modestinus ruled) just as if he had been a truant (*emansor*) or deserter during the time by which he exceeded his furlough; but he should first be allowed an opportunity of explaining whether he happened to be detained by some accident which could be held fit ground for a pardon. So wholly undesirable was ab-

Dig. 49, 16: 3 (7)  
and 14.

sence from the colors considered that, according to an opinion given by Ulpian, a soldier who was away on furlough was not held to be away on

Dig. 49, 16, 1.

State service, and Javolenus was of the same opinion with regard to one

Dig. 4, 6, 34.

who, e. g., was wandering or taking his ease at home. For, as Ulpian says, those only are held to be away on State business who are away com-

Dig. 4, 6, 36.

pulsorily and not for reasons of their own convenience. And we have elsewhere said that leave of absence should be given to soldiers as sparingly as possible.

Above, ch. on the  
Office of Tribune.

## CHAPTER XII.

*Of deserters.*

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|-------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1. Who a deserter is, and the manner of his punishment.</p> <p>2. Those who screen a deserter.</p> | <p>3. A deserter who is reinstated does not get paid for the time of his desertion.</p> <p>4. He who has withdrawn his son from military service.</p> |
|-------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|

[1] A deserter, in legal intendment, is one who is recaptured after a long period of unauthorized absence. Now when once a man was enrolled as a soldier, he might not quit the service unless duly discharged; so to do was reckoned one of the gravest crimes. All deserters, however, are not to be punished alike, for the man's grade and pay and antecedents will be taken into account. It is material, too, whether he deserted alone or with a number, and whether for the first or some subsequent time, and whether he added some other crime to that of desertion; and account must be taken, too, of the time at which the desertion took place, for he who deserts in time of peace is degraded if a horse-soldier and put to inferior service if in the infantry, while desertion in time of war is a capital offense. Severer penalties, too, are provided in the case of one who after his desertion re-enters the service elsewhere or allows himself to be levied. Commanders allowed any one to maltreat a deserter, but this was confined by the Emperor Leo to the case where the man resisted after he was discovered. The property of those who have died while deserting is publicly sold.

[2] Now not only are the deserters themselves to be punished, but also those who screen them, e. g., a judge who, for favor or by carelessness, has neglected to deal with a deserter. He, on the contrary, who gives up a deserter is rewarded: and indulgence is commonly shown to a deserter who gives himself up, unless it be after five years' desertion, for such an one is to be deported.

[3] And although by indulgence a deserter has been reinstated, he can not claim pay for the time of his desertion.

[4] Penalties no less severe than those enacted against a deserter were enacted against one who withdrew his son from military service. If he did this in time of war he was punished by exile and loss of property; and if in time of peace, he was flogged and the young man who had been claimed was put to inferior duties. And, by a rescript of the Emperor Trajan, he who maimed his son at the time of a levy, so as to render him unfit for military service, was to be deported.

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And Cæsar, when the circumstances required it, is said to have been, among other things, a very sharp inquisitor of the seditious and of deserters, and a very ruthless punisher, too. And it is on record that Aufidius Cassius set the novel example of cutting off the hands and feet of deserters, declaring that it would be better for discipline that the criminal should drag out a wretched existence than that he should be killed.

## CHAPTER XIII.

*Of deserters to the enemy and traitors.*

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| 1. Deserters to the enemy very severely dealt with.<br>2. He who can return but does not is reckoned a deserter to the enemy.<br>3. How those who carry intelligence to the enemy are to be punished. | 4. Secrets of the council not to be disclosed.<br>5. The enemy's spies.<br>6. Whether it befits a gentleman to be a spy.<br>7. Very unsafe to trust to deserters from the enemy. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

[1] Very severe measures were always taken against deserters to the enemy, as being guilty of no ordinary crime and as traitors to their fatherland and their fellow-citizens, and they were deemed unworthy of pardon. For, as Paulus says, "A deserter who with evil design and traitorous intent has abandoned his native country is to be reckoned an enemy and punished capitally; and wherever he is found he may be killed like an enemy and he is within the *Lex Julia majestatis* (on treason); he can be tortured or condemned to the beasts or gallows, although his fellow-soldiers are not liable to those punishments. He, too, who is arrested when planning to desert to the enemy, is capitally punished." And so the senator Fulvius ordered his son, who was caught on the way to join Catiline, to be killed.

Publius Scipio Africanus, too, although in other respects of a most lenient disposition, was bitter against deserters and fugitives; and, after the overthrow of Carthage, he ordered, for the better establishment of military discipline, that any Romans who, in contempt of authority, had deserted to the enemy, should be crucified and any Latins be beheaded: and Africanus the younger sent such deserters to the beasts. Paulus Æmilius, at the capture of Elephantis, and Marcus Marcellus at the capture of Leontini, beheaded about two thousand deserters. And we read that Metius Suffetius, when found guilty of treason, was drawn in pieces by four horses. And three hundred and seventy deserters to Hannibal, when recaptured by Quintus Fabius, were sent to Rome and all scourged in public and thrown from the rock. On another occasion, however, the same Fabius Maximus acted more leniently, for he ordered the amputation of the right hands of those who had deserted to the enemy in breach of their vow, so that the display of their mutilated arms should strike terror into the others and serve as a warning to others not to venture on the same crime. Indeed, among the Athenians it was a sacrilege to bury a traitor; he and all his issue were declared infamous and their corpses were ordered to be thrown over the boundaries of the State. To that

Plut., On God's slow-moving vengeance.

deserter, however, who has subsequently captured many of the enemy and has pointed out the deserters among them, clemency may be shown, according to a rescript of the Emperor Hadrian.

Dig. 49, 1, 5 (end).

[2] He, too, is reckoned as a deserter to the enemy who, having an opportunity to return from captivity, has not done so; and, indeed, soldiers whom the enemy has released are not reinstated unless it is clear that they were genuine captives, not deserters.

Dig. 49, 1, 5, 5.

Dig. 49, 1, 5, 6.

[3] Further, those who secretly carry intelligence to the enemy are reckoned traitors and visited with capital punishment, either burning alive or hanging. It happened once at Carthage that one of the most powerful men of his day was found guilty of treason, his hatred of the general Hanno having led him to write in Greek to the tyrant Dionysius telling him of the approach of the army and of the slackness of the general: their Senate, in consequence, enacted that thenceforth no Carthaginian should learn either Greek literature or speech, so that there could not be any interpreter either for conversation or for correspondence.

Dig. 49, 1, 6, 4.  
Span. Ordin., bk. 2,  
tit. 28, par. 2 and  
bk. 24, tit. 21, par. 2.

Dig. 48, 19, 8, 2.  
Justin, bk. 20.

[4] Again, not only do those who carry secret intelligence to the enemy merit punishment, but those also who spread it abroad among their own troops. Accordingly, the Egyptians had a provision in their military law whereby any one who published a general's plans was to lose his tongue. And the Persians of old, in their discipline, secured the safe-keeping of the king's secrets by the penalty of death. And it is on record that no Senator for many centuries divulged the secret counsels of the Roman Senate. Accordingly, when Quintus Fabius Maximus told Publius Crassus about the secret proceedings of the Senate, with regard to a declaration of war against Carthage, he was vehemently upbraided by the consuls, although it was an act of inadvertence; for Fabius was aware that Crassus had held the quæstorship for the preceding three years and was unaware that the censors had not yet placed him in the ranks of the Senate. For, as Valerius Maximus says, they would never allow the habit of silence to be impaired, it being one of the most valuable and surest safeguards of administration.

Diod. Sicul., bk. 2.  
Quint. Curt., bk. 4.

Bk. 2, ch. 2.

And so when the Asiatic sovereign, Eumenes, who was a great partisan of the Romans, intimated to the Roman Senate that Perseus was preparing to make war on the Roman people, it was not until after the capture of Perseus was known that any information could be obtained with regard to what Eumenes had told the Senate or the nature of their reply. It was, accordingly, a wise reply that Cæcilius Metellus gave to the military tribune who was interrogating him about his plans: "If I thought," said he, "that my tunic knew them I would take it off and throw it into the fire"; indicating thereby that the schemes of generals should not be disclosed.

Val. Max., bk. 2,  
ch. 2.

Further, those must be added to the list of traitors who supply the enemy with weapons and arms. This is a capital offense and their prop-

Cod. 4, 41, 1. erty is sold up. And Paulus gave an opinion that material of war can  
 Dig. 48, 4, 4. not be sold to the enemy without risk of capital punishment. They, in-  
 Dig. 39, 4, 11. deed, who assisted the barbarians to plunder the Romans and divided  
 Cod. 12, 35, 9. the spoil with the enemy were burned alive.

[5] Further, enemy spies who may fall into our hands do not merit such bitter aversion as those who desert to the enemy or carry secret intelligence to him. This is evident at first sight, for their conduct is not stained with perfidy. And so when a certain Carthaginian spy who had escaped capture for two years was at last caught at Rome, Livy, bk. 22. he only had his hands cut off and was then let go.

[6] It is often asked in this connection whether it befits a gentleman (*nobilis*) to be a spy and secretly find out what the enemy is planning and doing. And my opinion is that it would not be honorable for a gentleman to ply this business professedly and for hire, and that he could not do so without ignominy—as may be gathered from the full treatise of Tiraqueau on *nobilitas*—but if his motive in doing it was love of the State and the safety of the general public, I pronounce it not only not unworthy a gentleman, but eminently glorious. For the Lord commanded Moses, when he was journeying with the Israelites into the Land of Promise, to send men forward, one chosen from each of the tribes and every one a ruler, into the land of Canaan, to see the land, what it was and its size, and the people that dwelled therein, whether they were strong or weak, few or many, and what the land was, whether fat or lean, and the cities, whether they were strongholds or not, and generally to spy out all they could. And Joshua sent two spies into the Numb., ch. 13. city of Jericho before he besieged it. Josh., ch. 2.

And so, also, Sextus Tarquinius, feigning that his father was harsh and bitter towards him, fled to Gabii and was chosen by the men of that town to be their general, and, after winning a battle or two, was intrusted with the whole affairs of Gabii; whereupon he carried off the chief men of the State from its midst and delivered up the town, without Livy, bk. 2. a blow struck, into the hands of his father, who was besieging it.

And when Zopyrus, a man of high rank and a friend of Darius, King of the Persians, saw that that King was weary of the long siege of Babylon and that the storming of the city would be very difficult, he had his nose and ears shorn off and fled to the Babylonians with his body mutilated, feigning that it was Darius who had thus foully treated him. The enemy believed him and received him kindly and gave him command of a body of horse and, after one or two successes in battle, made him at length commander-in-chief of their army; whereupon he delivered both city and army up to Darius. Justin, bk. 2.

Araspa, also, a Mede of very high rank and one of Cyrus' intimates, went over, on Cyrus' orders, to the King of Assyria as a deserter and, after spying out the enemy's forces and plans, returned to Cyrus and was commended by him in the public assembly. Xenoph., Cyropaedia, bk. 6.

[7] These examples show us how very hazardous it is to trust to deserters; for even if they are fleeing to us without guile or fraud and are genuinely betraying their own side, not much reliance can be placed on them, for how can you hope that a man will be faithful to foreigners who has shown himself unfaithful to his native land? And so Antigonus used to say that he liked traitors during their treason, but that afterwards he found them utterly repulsive. That is the meaning of Augustus' saying, "I like treachery, but do not commend the traitor."

Plut., Apoph.

And when some one complained to Philip of Macedon that the troops nicknamed him traitor because he had betrayed his country to Philip, that king made the witty reply, although he always chuckled at deceiving an enemy, "Don't be surprised: the Macedonians are very dull-witted: and rustic enough to call a spade a spade." By this reply Philip showed that traitors deserved obloquy from every one. And it was of a truth implanted in the Romans of old that they ought to gain their successes by what they themselves called Roman arts, i. e., by valor, toil and arms, rather than by the crooked conduct of others, as we have shown elsewhere.

Above, ch. on Trickeries and deceit in war.

## CHAPTER XIV.

*Of the seditious.*

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| <ol style="list-style-type: none"> <li>1. Intestine seditious dangerous.</li> <li>2. Severe measures to be taken against the seditious.</li> <li>3. Sovereign authority not to be rashly asserted.</li> <li>4. Luxury and license great breeders of sedition.</li> </ol> | <ol style="list-style-type: none"> <li>5. Wonderful skill in quieting sedition.</li> <li>6. Standards of conduct different in peace and in war.</li> <li>7. Sedition to be appeased before the ring-leaders are punished.</li> <li>8. How sedition may be repressed.</li> </ol> |
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[1] How dangerous intestine dissensions are was neatly shown by the orator Menenius Agrippa, in the fable about the revolted limbs of the human body, which he addressed to the people who had seceded to the Sacred Mount. And Scillurus showed the same thing with his bundle of spears which he displayed to his eighty descendants for them to try to break. For it is sufficiently evident that not fewer armies have been ruined by their own strength through discord and sedition than have been overthrown by the enemy.

[2] Accordingly, the very sternest measures are always taken against the seditious and the movers of sedition, as being guilty of treason. And so Modestinus ruled that a man who had stirred up a fierce sedition among the troops, should be capitally punished, but that if the disaffection did not go farther than bluster and mild complaints, the punishment should be degradation. And Paulus' view was that the seditious should be hanged or thrown to the beasts or deported to an island, according to their rank.

By the constitutions of the Kingdom of Spain, too, regard is to be had, in fixing punishment, to the quality of the offense and the rank of the offenders; and if the intent of their sedition was to neutralize an opportunity of striking some successful blow, they are to have their eyes plucked out and be cast into prison until the opportunity in question has gone by; while, if they are of the higher ranks, they are to be deemed prisoners and thereafter banished.

And, although Cæsar would overlook other offenses, he always punished sedition with marked severity; and at a time of civil disturbance and great public excitement he discharged a whole legion for sedition, and had the movers of the sedition beheaded. Shortly afterwards, however, he yielded to the entreaties of those whom he had discharged to be freed from ignominy, and he reinstated them and they turned out most valuable soldiers.

Dig. 48, 19, 38, 8.  
 Cod. 9, 30, 1 and 2.  
 Span. Ordin., bks. 4  
 and 5, tit. 28, par. 2.

Livy, bk. 2.

Dig. 48, 4, 1.  
 Dig. 49, 1, 3, end.

And when the troops kept threatening Cnæus Pompey that they would seize the money which he was carrying in his triumphal return home, and Servilius and Glaucias begged him to divide it up, so as to prevent sedition, he declared that he would forego his triumph and would rather die than give way to the audacity of the troops; so he addressed a scathing speech to the men and had the belaulled *fasces* pointed towards them, so that the plundering might begin with them, and by this haughty act he reduced the troops to decorum.

[3] Generals should, however, take heed not to venture on any rash assertion of their sovereign prerogative (the whole essential force of which resides in the consent of those who submit to it), where there is any chance that the soldiers will not obey orders. This was the prudent advice given by the legates to Appius Claudius when he proposed to take very severe measures against the soldiers for having, out of spite towards him, basely retreated to the camp after he had led them out to battle.

Livy, bk. 2.

Further, the consul Gemitius discharged four thousand men and beheaded them in the forum because, with utter abandonment of all discipline, they had seized Rhegium which they were garrisoning, and he forbade the burial of their bodies and that any one should mourn for their death.

Val. Max., bk. 2,  
ch. 7.  
Livy, bk. 28.

[4] Yet in the prevention and restraint of military sedition a commander must show great discretion. In the first place he ought to realize that ease and leisure breed luxury and license, and that these in their turn foster more than anything else the development of designs of this kind among the troops, as Livy has convincingly shown in his history, where he says: "Capua, even then by no means favorable to military discipline, banished the remembrance of their country from the minds of the soldiers, which were debauched by the supply of pleasures of all kinds, and schemes were being formed in winter-quarters for taking away Capua from the Campanians by the same kind of wickedness as that by which they had taken it from its original possessors."

Bk. 7.

[5] Again, the skill displayed by the consul Caius Martius Rutilius, in foiling the conspiracy at Capua, is much to be praised. He was a man of ripe age and experience, and thought it the wisest proceeding to frustrate the violence of the soldiers by prolonging their hope of executing their project at whatever time they might choose; and so he spread the rumor that the troops were to pass the winter of the next year in the same towns. For they had been cantoned throughout the cities of Campania. The edge being thus taken off the eagerness of their projects, the mutiny was set at rest for the time being. And the consul, having led out his army to the summer campaign, determined, with admirable adroitness, whilst he had the Samnites quiet, to purge the army by discharging the turbulent characters, some on one pretext, some on another.

Livy, bk. 7.

[6] Now, the time is not always a fitting one to make hazardous assertions of sovereign authority. For, as Tacitus says, what in times of peace is dealt with by disciplinary vengeance, is endured, for caution's sake, in times of sword and mob. And, as Fabius Maximus used to say, different counsels and different lines of conduct are followed in the full ardor of war and in the tranquillity of peace, as we have elsewhere shown. Hence, also, I think that when any serious sedition has arisen, all possible measures should be employed to appease it and that until that is done the movers ought not to be dealt with, for fear that otherwise the raging of the soldiery be rather irritated and kindled than soothed and extinguished.

Above, bk. 2, ch. 5.

That was the example which was set by Scipio at the time when a sedition broke out among his troops in his camp at Sucro in Spain. He sent seven military tribunes to them in order to calm the minds of the soldiers by their mild and soothing discourse, and then he drew them to Carthage by issuing a proclamation that they should come there to claim their pay. There he had the whole army surrounded, and after castigating the troops, who were numb with fear, in a powerful harangue, he had the leaders of the mutiny dragged into the midst of the assembly and bound naked to the stake and scourged and beheaded. There had been a divergence of opinion whether only the leaders of the mutiny should be visited with punishment or whether atonement should be exacted as for a defection rather than for a mutiny (it being of so dreadful a character as a precedent) by the punishment of a greater number. The more lenient view prevailed, that the punishment should fall where the guilt had originated.

Livy, bk. 28.

Annals, bk. 1.

[8] To this must be added the remark of Tacitus that it is a very serviceable thing for the preservation of soldiers' fidelity, at a time when sedition is feared, to spread the army out with long intervening gaps, lest the soldiers increase both their strength and their faults by union. And, further, seeing that ease is the great breeder of military sedition, it is expedient to break in on it with a war, after the fashion of Alexander. And Cæsar adopted a shrewd method in the civil war of binding his army to himself. For, he borrowed money from the military tribunes and the centurions, and then distributed it among the troops; hereby he attained two objects, for he secured the loyalty of the centurions by the pledge that he had thus given and he bought the affection of the troops with a bribe.

Cæsar, Civil war, bk. 1.

That, again, is memorable which the histories tell us about Hannibal. For, although he conducted a war for thirteen years on hostile soil and far from home and with varying fortune, and although his army was not homogeneous and made up of his own fellow-citizens, but was a mongrel assortment of all nationalities, who had no community of law or custom or speech, and differed in bearing and dress and arms, in rites

and religion (*sacra*) and almost in gods, yet he so bound them together by one bond that no sedition ever broke out among them or against their general, even when, as was often the case, there was a shortage of money and pay and supplies in hostile territory. We read the same thing about Viriatus, who for eight whole years, during which he was warring with the Romans, kept an army, composed of all races of mankind, free from sedition and in a most tractable disposition—a thing which indeed was impossible without a certain admirable virtue in the general. Livy, bk. 27. Appian, Span. war.

But Scipio, although in other respects a consummate commander, provided his men by his lenience with a handle for sedition, and Quintus Fabius Maximus used this to show that Scipio was born for the corruption of military discipline and that it was almost true to say that more was lost in Spain by the fault of Scipio through military sedition than in battle. So rooted in the natural disposition of some men is it to refuse to be offended rather than to pluck up sufficient courage to avenge offenses!

## CHAPTER XV.

*Of those who yield ground in battle, or surrender when beaten.*

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| <p>1. The general ought be more feared than the enemy.</p> <p>2. He who begins a flight from battle, is capitally punished.</p> <p>3. Severity conduces to success.</p> | <p>4. Those who surrender to the enemy have no right of postliminy.</p> <p>5. He who simulates illness through fear of the enemy.</p> |
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[1] The Lacedæmonian general Clearchus used to tell his army that they ought to fear their general more than they feared the enemy: he meant that those who shrank from a doubtful death in battle would find a sure punishment awaiting them if they deserted, his aim being that it should become an instinct with his soldiers either to conquer or die. And this necessity, indeed, is not infrequently turned into a virtue, as we have said elsewhere.

Above, bk. 2, ch. 11.

[2] And so it is provided in military law that the first to begin a flight from battle is capitally punished. And there is a similar royal enactment in Spain with regard to a nobleman who flees. By the canon law such a person is infamous; but the divine law requires that timid persons shall be ordered to return home, lest they infect others with their timidity. Appian Claudius, in the case of those who had yielded ground in the Volscian war, had one man drawn by lot out of every ten and executed. Antony did the same thing in the Parthian war.

Span. Ordin., last book, tit. 21, ch. 2.  
c. 17, C. 6, qu. 1.  
Deut., ch. 20  
Judith, ch. 7.  
Livy, bk. 3.  
Appian, Parthian war.

In the consulship of Publius Cornelius Nasica and Decimus Junius those who had quitted the ranks were ordered to be flogged and then were publicly sold. And when Attilius Regulus was marching out of Samnium into Luceria, and the advance of his army was barred by the enemy, he stationed a cohort with orders to slay any fugitives just as if they were deserters. And the first thing that Camillus did after his appointment as dictator, during the war with Veii, was to punish by martial law those who had fled from Veii, panic-stricken, during the last-preceding battle; in this way he took away from his men any especial dread of the enemy. Titus Scaurus forbade his son to come into his sight, because of his retreat before the enemy in the Tridentine pass; and the shame of this ignominy so weighed on the young man that he committed suicide.

Livy, bk. 5.

But Marcellus adopted a milder method with certain soldiers who had originated a retreat and had quitted the colors in panic; in the next

engagement he put them in the first rank, close-packed, so that by danger in other battles they might wipe out the ignominy they had incurred. The Roman Senate, however, by a stern decree reduced to a condition worse than death and banished into Sicily those who had abandoned their still-fighting comrades at Cannæ; and when Marcellus subsequently wrote for permission to employ their assistance in the storming of Syracuse, the Senate replied that they were unworthy to be received into the army and to have the State's interests intrusted to them, but that he might do what he judged expedient for the State, provided that none of them should have any privileges or receive any military reward or return to Italy so long as the enemy was in it.

Val. Max., bk. 2,  
ch. 7.

And the same measures were taken with regard to those soldiers who had saved themselves when the prætor Cnæus Fulvius was so disgracefully beaten and put to flight in Apulia: and, over and above this ignominy, they were forbidden to spend the winter in a town or to build winter-quarters nearer than ten miles to any town; and Cnæus Fulvius was accused capitally and went into exile. When Scipio, however, went over into Africa, he did not spurn the survivors of the defeat at Cannæ, for he knew that that defeat was not due to their cowardice, but to the fault of their general, and that there were not in the Roman army any troops equally ripe and experienced, not only in various modes of fighting but also in storming towns.

Livy, bk. 25.  
Val. Max., bk. 2,  
ch. 7.

Livy, bk. 26.

[3] Further, many examples show us how greatly this severe discipline conduces to success. One such example is that of Licinius Crassus, when dealing with the gladiator Spartacus: this man was making war on the Romans with a large band of fugitives and men of his own condition and was flushed with a certain number of successes: so Licinius decimated his legions because of their poor behavior in the field and thus made them fear him more than they feared the enemy. Then he led his men anew into line of battle; and, although his army was much reduced in size by this decimation, he inflicted great slaughter on the enemy and won a decisive victory over Spartacus. In the same way, when the troops of Lucius Apronius had been routed by Tacfarinas: Apronius, being more grieved at the disgrace of his own men than at the success of the enemy, did (says Tacitus) a thing which at that time was rare and a matter of ancient memory merely; i. e., he chose by lot one man out of every ten in the disgraced cohort and clubbed them to death; and this severity was so effectual that a company of veterans, not more than five hundred in number, routed the very same forces of Tacfarinas.

Appian, Civil war,  
bk. 1 (at end).

Annals, bk. 3.

[4] The Romans, furthermore, reckoned it base and worthy of punishment not only to yield ground and flee, but also to fall by surrender into the hands of the enemy. And so Ulpian ruled that those who surrender to the enemy with arms in their hands can not set up postliminy. And it is recorded that Titus Vespasianus maintained a discipline

Dig. 49, 15, 19.

so severe that he would not allow a certain soldier who, after capture by the enemy, had broken his chains and fled back to the camp, to continue in the service, and would not intrust arms to him because he had submitted to be taken alive by the enemy.

And when a large number of enslaved were voluntarily released and returned by Pyrrhus, the Senate, although the forces of the State were exceedingly reduced, decreed that those of them who had served in the horse should be joined to the foot and those who had been foot-soldiers should be enrolled in the auxiliary slingers and that none of them should come within the camp, or surround with a wall or a ditch the place assigned to them outside the camp, or have a tent made of skins; and he would only allow those to be reinstated in their former military condition who had won double spoils from the enemy.

Val. Max.,  
bk. 2, ch. 7.

And the Senate displayed equal severity when Hannibal offered it the chance of ransoming eight thousand Romans who had surrendered to him when left in the camp after the defeat at Cannæ; for it spurned his terms and, in lieu of the captives, enlisted eight thousand slaves bought with the public funds. It preferred to have the latter as soldiers, although there was an opportunity of ransoming the captives at a lower cost, being mindful that so large a number of armed young men could not have been so disgracefully captured if they had been willing to die honorably. Now it was implanted in the Romans that they must either conquer or die. And it is recorded that when Hannibal heard of this incident, he was dismayed to find the Roman Senate and people of so lofty a soul in adversity.

Livy, bk. 22  
Val. Max., bk. 2,  
ch. 7.  
Cic., Offic., bk. 3  
Dig. 49, 1, 6, 5.

[5] Lastly, those also who feign sickness through fear of the enemy are ordered to be punished capitally. And Sallust relates a notable thing about the old Romans, namely: that in time of war they were more often accused of fighting with the enemy contrary to orders, because the recall came too late to prevent them going into battle, than of daring to quit the colors or to yield ground under compulsion.

CHAPTER XVI.

*Of those who part with their arms or lose them.*

1. To lose arms in war, or to part with them, | 2. Arms are not reacquired by postliminy.  
a grave offense. | 3. The loss of shield or sword in battle.

[1] The ancients regarded arms as the limbs of a soldier, and so it was reckoned a grave crime to lose or part with them during war, and it was capitally punished. That crime is, indeed, put on a par with desertion, whether it be the whole outfit that is parted with or only a portion thereof—there being, however, this difference: a man who loses or parts with his leggings or cape is thrashed, but if it be his cuirass or sword or shield he is like a deserter, save that some allowance is made for a recruit. Dig. 49, 16, 3, 13.

[2] Hence it is that, as Marcellus ruled, arms are not reacquired by postliminy, because the loss of them is a disgrace. It is, accordingly, singular that by an ordinance of the Kingdom of Spain arms lost in war may be replaced out of any booty that may happen to be taken. The same constitution, however, brands nobles with infamy for this and deprives them of the prerogatives of their rank. And indeed the loss of arms in war has ever been held most disgraceful, and so when Marcus Cato, the son of the censor, was thrown during an engagement by a fall of his horse, and noticed, as he was gathering himself together again, that his sword had fallen out of its sheath, he so shrank from the ignominy thereof that he plunged into the thickest of the foe and after receiving several wounds recovered his sword and returned to his own men; and the enemy were so struck by this sight that on the following day they came as suppliants to beg for peace. Dig. 49, 16, 14.

The consul Lucius Calpurnius Piso, again, ordered his prefect of the horse, Caius Titius, who had surrendered to the enemy his arms and men when surrounded by a large number of fugitive slaves, to attend the parades in the general assembly (*principia*) during the whole time of his service, with the mantle of his toga torn in the lappets, with the girdle of his tunic undone, and with naked feet. And when Appius Claudius' force had been routed by the Volscians, he inveighed against it as a traitor to military discipline and a deserter of the colors, and demanded of the men one by one where the standards were and where their arms were, and he flogged and beheaded those soldiers who were without their arms and those standard-bearers who had lost their standards. Span. Ordin., bks. 4 and 5, tit. 25, par. 2.  
Span. Ordin., last bk., tit. 21, par. 2.  
Val. Max., bk. 3, ch. 2.  
Justin, bk. 33.  
Val. Max., bk. 2, ch. 7.  
Livy, bk. 2.  
Dion. Halic., bk. 9.

And the Lacedæmonians drove the poet Archilochus out of their city for writing a poem in which he seemed to suggest that the loss of arms was preferable to the loss of life. And the Spartan women used to bid their sons, when going out on a military expedition, either to return into their sight alive with their arms or with their arms to be brought back dead.

[3] Further, the Greeks had a military law that the soldier who lost his shield in battle should be punished capitally, but if it were his sword, he was to receive lighter punishment—the reason being that the generals of greatest reputation held it a more important point of discipline for a man to protect himself from the enemy and keep himself unhurt than for him to kill an enemy with hurt to himself. And that was the view of Scipio Æmilianus also, who said that he would rather save a fellow-citizen than undo many enemies. And so when Epaminondas lay dying, pierced by a spear, he asked first whether his shield was safe and then whether the enemy was utterly routed; and after he had obtained satisfying answers to both these questions, he died with heart at ease saying, “Now is your Epaminondas born, in that this is the manner of his death.”

Val. Max., bk. 3,  
ch. 2.

CHAPTER XVII.

Of those who desert, or neglect, their watch.

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|---------------------------------------------------------------|-----------------------------------------------------------|
| 1. The duties of the watch to be diligently performed.        | 3. The punishment of those who sleep at their posts.      |
| 2. One who deserts the palace-watch to be capitally punished. | 4. If prisoners intrusted to the ward of soldiers escape. |
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Not the least important part of military discipline is the proper posting of guards and close attention to the duties of the watch. We read how neglect in these particulars has led to the slaughter and overthrow of many armies, to the capture of many camps, and to the occupation of many cities. It was in this way, at a time when he was buried in slumber and wine, that the son of Queen Thomyris was attacked by Cyrus, and perished with his whole army. And after the loss of the Scipios in Spain, Lucius Marcius operated with the residue of the forces against two camps of the Carthaginians and, finding them in a complete state of disorder and neglect due to their victory, he captured them in one night with slaughter of the enemy. Justin, bk. 1.

[1, 2] Those, then, who fail in their duty on night-watch, when the rest of the force is sleeping in reliance on their diligence, deserve punishment. And so Paulus held that the punishment for desertion of the palace-watch, was capital; and Modestinus said that one who abandoned a post was worse than a truant (*emansor*) and that his punishment, according to the degree of guilt, was flogging or loss of rank, while one who quitted his watch over a commander (*præses*) or any other officer was liable to be treated as a deserter. When the Gauls had slipped through up to the summit of the capitol, owing to the neglect of the watch (though they were ultimately aroused by favor of the geese), Publius Sulpitius, the military tribune, proclaimed that he would proceed by martial law against the guard at that place, whom the enemy in their climb had eluded; but he was frightened by the unanimous clamor of the soldiers, who threw the blame upon one member of the watch, and he took no measures against the rest, but with universal approval hurled the undoubtedly guilty party from the rock. Livy, bk. 25.

[3] And when Epaminondas was going his round of the watches and posts, he made an example, in the interests of discipline, of a soldier whom he found asleep, for he plunged his sword through him, declaring that he had left him the same as he had found him. And Augustus punished with death the men and officers of a company who had deserted Plut., Apoph.

Span. Ordin., bk. 9,  
tit. 18, par. 2.  
On Roman camps.

their post. Further, by the constitutions of the Kingdom of Spain, those who sleep at their posts are, after three warnings, thrown from the rock or the walls of the fortification where their watch happens to be placed. And Polybius tells us the principle upon which camp-watches were appointed among the Romans, and about the duty of those who went rounds of inspection of the watches, and what the punishment was of those who were negligent.

Now Paulus Æmilius adopted a novel method for securing that the watches should strive more intently against sleeping, and that was to forbid them to take their shields with them on watch-duty, for this duty was quite distinct from fighting and did not involve the use of arms, but only of vigilance; so that directly they perceived the approach of the enemy they should retreat and rouse the rest to arms. And once when the Thebans made holiday and were all given up to wine and feasting, Epaminondas went round the city on foot, alone, and meanly-clad and full of thought; and, upon one of his friends expressing surprise and asking the reason, he replied, "In order that you all may drink and take your ease." And in the same way, once when Cambyses, the father of Cyrus, was asked about the best means of guarding a city, he shrewdly replied, "By the guards never thinking that they have taken sufficient measures of precaution against the enemy."

[4] Now it is usual to intrust the custody of prisoners to soldiers: and, if they escape, the soldier is, according to the degree of guilt, chastised or put to an inferior service; but careful inquiry must be made whether the escape was due to the culpable negligence of the soldier or to accident. The Emperor Hadrian gave a rescript to this effect.

Dig. 48, 3, 12, 1.

Dig. 48, 3, 12.

CHAPTER XVIII.

*Of him who loses, or surrenders to the enemy, a fortress or town which he has been appointed to defend.*

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1. He who has failed to hold a fortress, guilty of treason.</p> <p>2. In defense of a fortress, death not to be shunned.</p> <p>3. Should the commander of a fortress be punished when it has been taken without any fault imputable to him?</p> <p>4. In what circumstances a commander is not bound to defend a fortress.</p> | <p>5. The commander of an ill-equipped fortress.</p> <p>6. A fortress can hardly be given up to the enemy without incurring ignominy.</p> <p>7. Whether the erection of a fortress is more help or hindrance to a State.</p> <p>8. Foreigners ought not to have easy entrance to a fortress.</p> |
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If slaves have to answer with their head to their masters for the safe-keeping of the house, alike from foes within and foes without, how much more must they to whom the custody of a fortress or a town is intrusted, seeing that in the protection of the public safety none ought to shun any danger or torture, or death itself! The very highest standard of diligence must, therefore, be satisfied in the safe-keeping of a fortress.

[1] And so failure to hold a fortress, or the surrender of a camp to the enemy, is punishable under the *Lex Julia* about treason. The consul Lucius Rupilius, accordingly, in the campaign which he conducted against the deserters in Sicily, ordered his son-in-law, Quintus Fabius, to quit the province for losing the fortress of Tauromenium by his negligence. And Caius Cotta had his kinsman Publius Aurelius Pecuniola (whom he had put in charge of the siege of Lipara, when he himself was going to Messina in order to take the auspices) flogged and put to the military duties of a common foot-soldier for having by his fault allowed the battering-mound to be burnt and the camp to be all but taken. And when his battering-mound was burnt by the enemy, Marcus Antonius decimated two of the cohorts that had been engaged in that work, and punished the decurions individually, and dismissed the legate with ignominy, and had the rest of the legion given rations of barley.

Titus Turpilius Syllanus, the prefect of the town of Vacca, was called on by Metellus to explain why one of his soldiers had escaped when all the soldiers of the garrison were cut down by fraud, and because he could not clear himself he was condemned and flogged and punished capitally. The dictator Quintus Cincinnatus, after conquering the Æquians and sending them under the yoke, made Lucius Minutius, whom he had relieved when besieged by the enemy, resign the consul-

Dig. 29, 5, 1, pr.  
 By inference from Dig. 1, 15, 3, 3.  
 Dig. 48, 4, 2.  
 Val. Max., bk. 2, ch. 7.  
 Val. Max., bk. 2, ch. 7.  
 Appian, Parthian war.  
 Sallust, Jugurthine war.

ship, distributing the booty of all kinds among his own troops only; for he held that man unworthy of exalted command who owed his safety not to his own valor, but to a ditch and a wall, and who had not been ashamed to allow the arms of Rome to be confined within closed doors

Livy, bk. 3. by timid apprehensiveness.

Further, Alexander of Macedon punished with a fine a certain commandant of a fort for deserting his post; and after the Mamertines had accepted a Roman garrison and the Carthaginian garrison had been driven out by fighting, the Carthaginians crucified the commander of their garrison for his timidity and cowardice in losing that fortress. And that was an exceedingly fine remark of Alexander's which he made on hearing that Aornus, a rock in India, was naturally impregnable, but was held by a timorous man: "He makes," said Alexander, "the place quite easy of capture." And a certain Lacedæmonian noble made a fine reply when Philip threatened to decree (*prohibiturum*) punishment on him if the city was not handed over to him: "And will you decree (*prohibere*), too, that I am not to die for my country?"

Polyb., Hist., bk. 1.

Plut., Apoph.

And the reply made by Lucius Pinarius, who commanded the garrison in the fortress at Ænna in Sicily, was brave and wise. The leading men of Ænna had arranged with Himilco for betrayal of the garrison, but no opportunity for the treachery presented itself, so they publicly put it about that the town and fortress ought to be under their control and urged that the keys of the gates should be handed to them, because (said they) it was as freemen going into partnership that they had been given to the Romans and not as slaves going into custody. Then Pinarius made the reply that he had been placed in the command of the garrison by his general, and had received from him the keys of the gates and the ward of the fortress, which depended not on his discretion nor on that of the citizens of Ænna, but on the discretion of him who created the trust; that it was a capital offense among the Romans to quit one's post and that parents had sanctioned that law by the death even of their own children; that the consul Marcellus was not far off, and so they could send ambassadors to him who possessed the right and liberty of deciding. But the men of Ænna said they certainly would not send to him and solemnly declared that, as they could not obtain their object by argument, they would seek some means of asserting their liberty. Pinarius, upon this, asked that they would at least grant him an assembly of the people, so that it might be known whether the denunciations came from a few or from the whole State. And by their consent an assembly of the people was proclaimed for the next day. There all with one accord required him to surrender the keys, and when he lingered and put the matter off they passed on to fierce threats; whereon, as he could avail nothing, the prefect gave the soldiery the agreed-on signal with his gown and they rushed on the people of Ænna and put them, pitifully,

to the sword. By this act Ænna was retained. Marcellus did not reprobate it, but granted the spoil of the town to the soldiers, concluding that the Sicilians, deterred by this example, would refrain from betraying their garrisons.

Livy, bk. 24.

[2] And what has just been narrated agrees with the royal enactments of the Kingdom of Spain, whereby it is provided that no form of death should be shunned in the defense of a fortress, the safety of which calls for firm action from every one, even against a father or a son or a former master, and that no one ought to put death or any form of danger, which are but transitory, on the same plane as infamy, which brands a man who has paltered with his honor, him and his posterity forever. And indeed if the needs of hunger prove so imperious, a man ought rather to eat his son than surrender a fortress to the enemy without his lord's orders. And it is no ground of excuse for the surrender of a fortress that the enemy threaten death to his wife or children or any other persons; for the safety of the State ought to be preferred to love of children. And so Alfonso Perez Guzman, after Tarifa had been besieged for a fortnight and the enemy, being foiled in all their attempts were threatening to kill his son who was in their hands, made answer that he had begotten his son for the service of his country, and no immortal one either, and that he would rather be bereaved of him, should fate so decree, than quit his post or break his faith, for the one thing might happen even with glory to him, while the other thing could not happen without disgrace and crime; and so he allowed his son to be nefariously slain by the enemy before his eyes. And indeed the Spaniards were such severe censors of this kind of discipline that by one of their constitutions a commander of a fortress was none the less guilty of treason if the surrender of the fortress to the enemy was made by a deputy whom he had for good reason put in his place.

Span. Ordin., bk. 12, tit. 18, par. 2.

Span. Ordin., bk. 7, tit. 17, par. 2 and Cod. 4, 43, 1 and 2.

Span. Ordin., bks. 6 and 12, tit. 18, par. 2, and bk. 2, tit. 2, par. 7.

Span. Ordin., bks. 1 and 6, tit. 28, par. 2.

Cod. 9, 47, 22 and c. 23, Reg. jur. in vi.

Dig. 48, 3, 12.

[3] Further, seeing that it is inconsistent with justice to punish a man without fault and that a man who is free from fault ought to be free from punishment too, equity requires that if absolutely no fault or negligence can be imputed to the commander of a fortress which has chanced to be captured by, or surrendered to, the enemy, the commander ought to be exempt from punishment. And that this was considered reasonable by those of olden time is shown by the dispute relative to Marcus Livius, the commander of the fortress of Tarentum. Some blamed the commander, alleging that Tarentum had been surrendered to the enemy through his laxity; others commended him for having kept the fortress safe for five years and above all for having recaptured Tarentum by his own sole exploit; while a middle party declared that the decision rested with the censors and not with the Senate.

Livy, bk. 27.

And when Lucius Attilius, commander of the garrison at Locris, suffered himself and the Roman soldiers with him to be conveyed to

Rhegium, in order to snatch them from the enemy's cruelty and preserve them for the State, because he saw that he could not prevent the citizens from surrendering their town to the Carthaginians, this was not imputed to him as a fault. Accordingly, if a man under compulsion of necessity (which, as Livy somewhere says, not even the gods can overcome) and in the utter absence of human aid, surrenders a fortress to the enemy, I hold that he does not deserve punishment; for to do one's best is to do all the law requires, and a vassal only owes fealty to his suzerain within the limits of what is possible, there being no legal obligation to perform the impossible.

Livy, bk. 24.

Feudal Laws, bk. 1, tit. 1, last ch., and thereon Alvar. and other glossators, and Baldus on beginning of said tit.

Hence Egnazio tells us that those who were driven by necessity to surrender the fortress of Scutari to the Turks who were besieging it, received no upbraidings on their return to Venice; for the Senate knew what the force of necessity is and that no valor can stand up against it.

De exempl. illustr. vir., bk. 7, ch. 6.

[4] Hence it is a common doctrine that an ungarrisoned city is quit of the charge of treason should it be surrendered to the enemy, especially if no relief is sent, and that a commander of a fortress is not bound to defend it if the King fails to supply the things that are necessary for its defense. It is on this ground that a vassal is not bound to do his services to his lord, or to recognize him, if he abandons the vassal in time of need, and Charles Dumoulin records that the ancient kings of Gaul allowed towns which they could not defend to surrender to the enemy.

Math. de Afflic. on the royal constitution which begins, Dubitationem.

Heiron. Grat., cons. 5 and 51, bk 1.

Feudal Laws, bk. ii, tit. 26, c. 1, qual. dom. etiam propr. and thereon Alvar. and others on c. 1, § Domino committente, and thereon Baldus and others.

Joan. Imol., cons. 34. Decius, cons. 600, nu. 13. Panorm. cons. 3, nu. 5, bk. 1.

In addit., Dec. cons. 604.

I hold, accordingly, that if a fortress should be ill-equipped and its commander be without any human aid or hope of relief and can not withstand the force of the enemy, he may provide for the safety of himself and his men by bargain or in any other way and may abandon the fortress, especially when every expedient has been resorted to in vain and it is clear that the fortress would have fallen into the power of the enemy in any case; for there is no obligation to await that which would do no good if it did happen. That is why a man who is remiss (*in mora*) in performing his contract to deliver some specific thing is not liable on a destruction of the thing in question which would have happened just the same if the thing had been in the hands of the other party. A commander of a fortress, accordingly, is not bound to offer himself and his garrison to absolutely certain death, to the hurt rather than to the profit of the State.

[1. stipulatio, § divus. Dig. (?).]

Dig. 16, 3, 14; and 5, 3, 40; and 12, 1, 5 and the commentators thereon.

And so Callicratides, the Spartan general, incurred well-merited blame for preferring to risk his fleet rather than his own reputation; and so, too, did Cleombrotus, who, through fear of falling into disfavor, rashly engaged with Epaminondas and ruined the force of Sparta. For a great man, as Quintus Curtius says, ought rather to scorn death than hate life, and Cicero teaches that we ought to die for our country whenever our death will benefit it. We must accordingly do what is best for

Cic., Offic., bk. 1.

Offic., bk. 1.

our State and country in all possible ways, whether by surrender or by death, should the occasion arise; for a brave man must consider in all his acts the interests of his country and not his own, as we have shown elsewhere.

Above, bk. 2, ch. 1.

[5] Add to the foregoing that by the constitutions of the Kingdom of Spain, which in other respects are not wanting in severity, he who has been intrusted by the King with the command of a fortress which is so badly built and ill-equipped that it can not be defended, and who has represented this to the King, is not guilty of treason, should the enemy gain the fortress by force and without the commander's fault. And, on this principle, under a rule contained in the same constitutions, when a commander of a fortress is unwilling to undertake its defense himself, he is allowed to abandon it, after furnishing reasons why the defense is impossible, and this, too, without waiting for the enemy's attack, if the King should not have despatched a successor. But, for this to be so, no one ought to undertake the command of a fortress or town save with much deliberation; and he ought so to arrange that if any reverse occurs and he is absolutely driven to surrender, this may not seem to be due to the fear of death so much as to the wish to preserve himself and his men for the service of the State and at all events to snatch a portion of the State's defenses out of a fortress which was about to belong entirely to the enemy.

Span. Ordin., bks. 4 and 6, tit. 18, par. 2.

Span. Ordin., bk. 20, tit. 18, par. 2.

[6] Although, however, the commander may be but discharging the duty of an intrepid man, it is barely possible for him to surrender his fortress without ignominy. For if, as we have shown above, the ancients held it a disgrace for a single soldier to fall into the enemy's hands, what shall we say in the case of a commander who has been commissioned to defend the fortress and has bound himself by an oath so to do? Nevertheless, as we have said elsewhere, he must incur even this ignominy, if it serve the interests of the State, rather than desert and betray his country by a futile defense and the dedication of himself and his men to death. Now the functions of a commander are one thing, those of a soldier another. The latter has to fight with bravery and the former to safeguard the interests of the State.

Above, bk. 3, ch. 15.

Above, bk. 2, ch. 1.

[7] Further, there was once no small discussion among writers on politics, whether the erection of fortresses did more good or harm to the State; and, although it was a prevalent view that a fortress was a useless and hazardous thing in the ideal State, still Rome was recovered, after its capture by the Gauls, by the garrison of the capitol; and the town of Ænna, mentioned above, was saved by means of its fortress and garrison.

[8] I hold, then, that there are many cases in which the erection of a fortress is expedient or even necessary, alike for withstanding an enemy's attack and for the preservation of the citizens in time of peace. For the rest, I would have commanders of fortresses enjoined to be chary

in allowing foreigners, especially men of strength and leading, access into the fortress, and to be mindful of the advice given by Pyrrhus, King of Epirus. For, when visiting Athens, Pyrrhus was shown over the citadel of Pallas, which was highly fortified by nature and art, and he viewed it with great appreciation and then he urged the prominent citizens who were in attendance on him never in the future to allow any king facilities for entering that citadel, for fear that some one might seize the opportunity of introducing an escort and might attack it; and this advice commended itself to the Athenians.

## CHAPTER XIX.

*Of theft and certain other military offenses.*

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| <p>1. Punishment of soldiers caught thieving.</p> <p>2. The nature of the oath which tribunes usually exact.</p> <p>3. It is against the regulations to go out of trumpet-range.</p> <p>4. A capital offense to strike a comrade with a sword.</p> | <p>5. A serious offense for a disqualified person to enlist.</p> <p>6. The punishment of a non-soldier who poses as a soldier.</p> <p>7. The punishment of a non-citizen who poses as a citizen.</p> |
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[1] The sole reason, according to Plato in his *Republic*, why man, in the fiction of the poets, was changed into a wolf is that those who have given themselves up to plunder and theft seem to have simply put off the man and the qualities of manhood and to be now men in name only and not in reality; they must, accordingly, be repressed by severe punishments. And, although the civil law does not impose corporal punishment on civilians for theft, yet commanders, for the better establishing of military discipline, generally impose somewhat severe penalties on soldiers taken in theft. And so Tiberius had a soldier of the prætorian guard executed for stealing a peacock out of his grounds. Aufidius Cas-

Suetonius on Tiberius.

sus crucified soldiers who offered violence or caused loss to provincials, and there are numerous examples recorded of ancient commanders doing the same thing. But the jurisconsult Paulus ruled that a soldier found thieving in the baths ought to be discharged with ignominy.

[2, 3] Now it is usual for tribunes, on pitching a camp, to exact from all in it, whether free or slave, an oath that they will not steal anything from the camp and that, if they find anything, they will bring it to the tribunes. The formula of this oath is given by Gellius. And, for preventing the troops from looting, they are not allowed to go out of trumpet-range, except by the orders of the general or tribune, or to go outside the fortifications or quit the ranks. We have dealt with this elsewhere.

Dig. 47, 17, 3.

Polyb. on Roman Camps. Bk. 19, ch. 4.

[4] Marcus Cato held that those found thieving from their comrades should lose their right hands. Modestinus ruled that one who surreptitiously took another soldier's arms should be degraded from the service. And in olden days great pains were taken to develop the idea of affectionate comradeship as the most effectual link between soldier and soldier, and as a kind of indissoluble bond. Hence it was a capital offense to strike a comrade with a sword, and one who even wounded another with a stone had to leave the service. Again, a soldier so careless

Above, bk. 3, ch. 11.

Dig. 49, 16, 3, 14.

Dig. 49, 16, 6, 6.

of his honor as to compound for a money-payment with the avowterer

Dig. 48, 5, 12. of his wife is discharged from his oath and deported.

[5, 6, 7] It is also reckoned a serious offense for a disqualified person to enlist, and it becomes more heinous, as in the case of other offenses;

Dig. 49, 16, 2. the higher the dignity, rank, and distinction in the service. The penalty

Dig. 48, 10, 27, 2. of fraud attaches, too, to a non-soldier who poses as a soldier; and similar in character is the law introduced by the consuls Crassus and Scævola

Cic., *Offic.* bk. 3. forbidding a non-citizen to pose as a citizen—such a person was said to

Sueton. on *Claudius*. be accused of peregrinity. Now the penalty for fraud is deportation

Dig. 48, 10, 1. and public sale of property.

CHAPTER XX.  
Of soldiers' rewards.

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| <ol style="list-style-type: none"> <li>1. The bestowal of punishments and rewards the best means of governing a State.</li> <li>2. Soldiers to be incited by the offer of rewards.</li> <li>3. Many rewards open to the soldier.</li> <li>4. <i>Spolia opima</i>, what they were.</li> <li>5. When a triumph may be decreed.</li> <li>6. How long the Romans kept up the custom of the triumph.</li> </ol> | <ol style="list-style-type: none"> <li>7. Roman generals took names from the provinces and towns which they had subdued.</li> <li>8. Military gifts were of divers sorts.</li> <li>9. Military crowns, what they were.</li> <li>10. A reward having been offered to the first to scale a wall, several scale it at the same time.</li> <li>11. The rewards owed to dead parents given to their children.</li> </ol> |
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[1] There is no better method of governing a State than the bestowal of punishments and rewards: this is approved by numerous opinions of philosophers. Thus Solon, one of the seven wise men and the only legislator among them, said that the stability of a State depends on it. And Democritus held that there were just two gods, Punishment and Reward. And when Lysander was asked what form of State he most favored, he replied, "That in which the brave and the cowardly get their respective deserts." When Theophrastus was asked what was the best protection of human life, he said, "Rewards and punishments." And Cicero asserts that neither a household nor a State can stand without any rewards for good deeds and punishments for bad ones. And no one, the same writer says, incurs dangers on the State's behalf in a laudable and valorous way, but his motive is the hope of reward from posterity. And where, said Thucydides, the greatest rewards of good conduct are offered, there the best men govern; for when good conduct receives the richest rewards, all strive for them with the best intent towards the State.

Plut., Apoph.

Nature of the gods, bk. 3.

Speech for Rabirius.

Panegyrica.

Bk. 4.

Against Leptines.

Pliny wrote, addressing Trajan, "The rewards of goodness and badness make the good and the bad; and the pleasure always felt by the deserving at being rewarded, reacts on others like them as much as on themselves." And labor, says Livy, will be bestowed and danger run in a quarter whence emolument and honor may be hoped for, and there is nothing that men will not undertake if rewards be offered proportionate to the arduous nature of the task, and high honors breed high courage. And so Socrates said that that was the best State in which there were the greatest inducements to virtue. Hence Demosthenes spoke as follows:

"Men of Athens, you ought to devote great zeal and attention to secure that all your laws shall be of the most excellent character and that this shall especially be the case with those which can increase or impair

the prosperity of the city. Now which are these? Those, of a truth, which confer honor on those who have deserved well and those which repress the bad with punishment; for if every one were deterred from every kind of wrong-doing by the fear of those evils which are the sanction of law, and if every one were incited to a zealous discharge of duty by the rewards attached to good acts, what could prevent the city from attaining the amplest prosperity?"

[2] Accordingly, just as military discipline needs sharpness in its punishments, so also there should be rewards to incite soldiers to valor. And herein a mistake is commonly made, in that (as Tacitus said) it is easier to requite an injury than a kindness, for gratitude is reckoned a burden and revenge a gain and many States are ruined, as Euripides says in his *Hecuba*, by the good and strenuous man receiving no greater reward than the slothful. Now Cyrus held in the highest esteem those who excelled in the military virtues, bestowing many honors on them.

[3, 4] Among the Romans, too, there were numerous prizes for valor open to soldiers and we will here cursorily review them. In the first place, then, if generals and kings, who had the chief guidance of affairs, had, when fighting in person, stripped the opposing general of his arms (then called *spolia opima*, or spoils of honor), they were allowed by way of reward to carry those *spolia opima* into the capitol and offer them to Jupiter Feretrius. It is believed that this offering was only thrice made by Roman generals, these being men who had toiled valorously and strenuously on behalf of the State. Romulus, the founder and father of the City, is said to have carried off the first *spolia opima*; this was from Acron, King of the Cæninenses, after the rape of the Sabine women; and on this occasion Romulus dedicated the temple of Jupiter Feretrius. Not very long afterwards, Cornelius Cossus, a renowned general of that day, carried off the second *spolia opima* from Lars Tolumnius, King of Veii, whom he overthrew in battle and killed. The  
Livy, bk. 1.  
Livy, bk. 4.  
Val. Max., bk. 3, ch. 2.  
doughty Claudius Marcellus, a good commander, carried off the third from Viridomarus, a Gallic chieftain, whom he conquered near the Po.

[5] In addition, commanders-in-chief were accorded triumphs for success in war, and this was the greatest prize of victory. Not every victory entitled to a triumph, but only when the character of the war and the victory seemed to justify that distinction; for it was provided by law that no one should celebrate a triumph unless he had slain five thousand of the enemy in one battle and had routed great forces in a pitched battle, and punishment awaited that general who made a false return to the Senate of the number of the enemy killed in a battle or of the number of citizens lost in it; for a triumph was not allowed to a man who had won an over-sanguinary battle with great loss, that being a sad and meager gain, bringing to the State many funerals and little advantage. It was also enacted that a triumph should not be decreed except for an enlarge-

ment of dominion and not for regaining what had been previously lost in the war. And a further condition was that the general should have overthrown and conquered the enemy under his own leadership and management, and in his own and not another's province, and in such a way as to pacify it and leave no trace of war behind him.

Again, if the war was against privates or slaves or fugitives, or any other class of men unworthy of the Roman name, it was exactly as if the cause of the war was a shameful one; and, despite the victory that was won and the rout and overthrow of the enemy, no triumph could be celebrated. Further, even though the enemy had been defeated and put to flight, and exploits worthy of a triumph had been performed, it was considered impious to celebrate a triumph if neither consul nor prætor had commanded the army and the conquest and scattering of the enemy had not been achieved under the leadership and command of the proper magistrate. And if there had been two commanders, both magistrates, a triumph was granted only to the one of higher rank, lest the glory of the triumph should put the lower and the higher authority on an equal footing and the auspices which pertained to the higher magistracy should be brought into confused relations with the lower; a consul, accordingly, did not triumph side by side with a dictator or a prætor. But some of the cases where a Roman general was not allowed to celebrate a triumph were cases for a lesser triumph, or ovation.

Further, it was immaterial what glorious exploits and distinguished services had been performed or rendered to the State in a civil war, the commander derived no name therefrom, nor were any public thanksgivings decreed, nor any entrance into the city with ovation or triumph; because, however necessary victories of that kind might be, they were always deemed lamentable, as being won at the expense of home blood, not foreign. It is also clear that a Roman citizen when conquered in war could not be led in triumph, no matter how harmful and hostile he had been to the State.

[6] Now the custom of celebrating a triumph over conquered nations who had been beaten in war survived at Rome up to the time of the Emperor Probus, who is said to have been the last of the Cæsars to celebrate a triumph. Many details about the law of triumphs and about the apparatus and ceremony of a Roman triumph may be found in Valerius Maximus and Alexander ab Alexandro.

Bk. 2, ch. 8.

Genial. dies, bk. 1,  
ch. 2 and bk. 6,  
chs. 6 and 17.

[7] Roman generals were also wont to derive a surname by way of honor, from the towns and provinces which they had subdued by force. Thus, of the three Metelli, one took the cognomen Numidicus, from his conquest of Numidia; another Macedonicus from Macedonia, and the third Creticus from Crete; and there was also a Metellus Balearicus, so called because of his victory over the Baleares. And Martius Coriolanus was so called from the Volscian town of Corioli; and the two

Scipios, the elder and the younger, both took the surname Africanus from Africa; and another Scipio took that of Asiaticus from Asia. In the same way with a large number of others, whose examples the Cæsars subsequently followed, bearing illustrious surnames derived from races and nations whom they had overthrown in war, to their immortal glory: and they often took surnames under a popular decree and occasionally by an acclamation of the Senate—whence the diverse titles of Arabicus, Adiabenicus, Parthicus, Armenicus, Germanicus, Sarmaticus, and Africus.

Alex. ab. Alex.,  
Genial. dies, bk. 2,  
ch. 11.

[8] Moreover, there were diverse kinds of military gifts which in earlier times were given by generals to soldiers for valor in the field: and among the other prizes of the military profession the following were held specially honorable. There was the gift of the land won by their blood and sweat made to time-expired soldiers after the toils they had undergone; this they received as a most welcome return for labors and dangers, a sort of first-rate booty. Again, for the greater incitement of their courage towards the glories of military service by bringing their valor into greater honor and publicity, there was invented the reward of military crowns and other very signal tokens of honor, such as golden chains and double rations; and sometimes generals granted furlough or double pay as a reward of valor.

As appears from  
Dig. 6, 1, 15, 2  
and 41, 1, 16.

And there were several cases where persons who had rendered distinguished services in war and who had found their private concerns in an embarrassed and ruinous condition received gifts and gratuities. Thus we read that Lucius Sicinius Dentatus, a man of distinguished parts and performance, was presented, for his military exploits, in addition to eight golden crowns and fourteen civic wreaths and three mural wreaths and one obsidional wreath, with one hundred and eighty-three neck-chains, one hundred and forty armlets, eighteen unstained spears, and twenty-five medals. Manlius Torquatus was not far short of this: for he brought back the arms of about thirty slain enemies and received about forty rewards from generals, including two noble mural wreaths and eight civic wreaths. No one, however, who had performed any exploit went away unrewarded with military gifts, in proportion to his merits and valor.

Val. Max.,  
bk. 3, ch. 2.

Livy, bk. 6.

[9] There were, it may be added, many varieties of military wreath: the triumphal, the ovational, the obsidional, the civic, the mural, the naval, the castrensic—wherewith generals and others were presented for raising the siege of a town or camp or army, or for saving the life of a fellow-citizen, or for being the first to scale an enemy's walls.

Gell., Noct. Attic.,  
bk. 5, ch. 6.

[10] Now, suppose a reward is offered to the first to scale an enemy's wall, and two or more scale it at the same moment, it is often discussed whether the reward be due to all or to none: and the prevalent opinion is that it is due to none, for each bars the way of the other and

Dig. 34, 5, 10.

Dig. 28, 5, 44. is a hindrance to him; and where all are equal there can not be a victory. Dig. 45, 2, 18.

Now, this is sound if the general has clearly meant to give the reward to one only, as if the offered reward was such and such a horse, for this kind of offer does not admit of multiplication; but otherwise I think the

prize is due to all. For, as Africanus held, "first" does not only mean being in front of everybody, but not having anybody in front of you. Dig. 28, 6, 34.

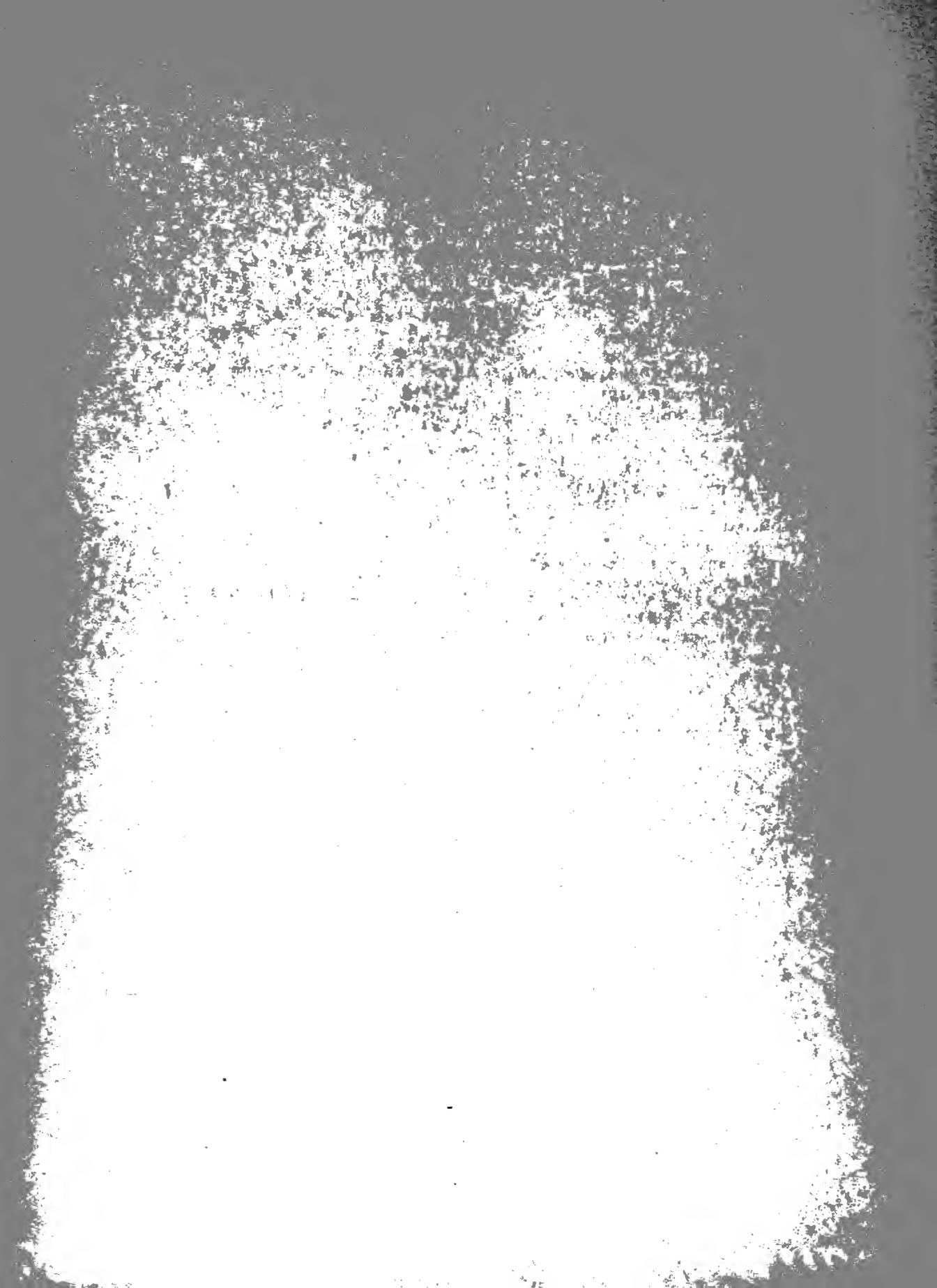
And Paulus says, "*proximus*" means one with no one in front of him. Dig. 50, 16, 92.

The same holds good where there is a doubt who was the first to scale the wall. By inference from Dig. 34, 5, 9 pr. and 10 (1).

And Scipio followed that opinion after the capture of Nova Carthago, for at that time a great strife, almost amounting to sedition, occurred between Quintus Tiberilius, a centurion of the fourth legion, and Sextus Digitius, a naval auxiliary, each one insisting that he was the first to scale the wall and that the honor of the mural wreath belonged to him; so Scipio ordered a general assembly and declared himself satisfied that Quintus Tiberilius and Sextus Digitius were absolutely equal in scaling the wall and that he would give both a mural wreath for valor. Livy, bk. 26.

But Augustus was readier to give medals, neck-chains, and other gold ornaments as rewards than mural, or camp, or civic wreaths.

[11] The constitutions of Spain, also, provide numerous rewards for bravery in the field and declare these rewards to be due to the children if the parents who won them be dead; and this was ruled long ago by Pisistratus. And at Athens a law of Solon enacted that, over and above these gifts granted to soldiers by generals, the children of those who perished in war should be nurtured and well educated at the public cost. And Constantine declared that the sons should be summoned to the military profession of their father. Span. Ordin., bk. 5, tit. 27, par. 2. Cod. 12, 47: 1 and 2.



## INDEX OF CITATIONS.

(The numbers indicate pages of the translation. This index will also serve as a key to the meaning of the abbreviations in the marginal notes.)

- Abb. or Abbas, *see* Panormitanus  
 Accurtius, on Code, 53  
     on Digest, 52, 54, 71, 198  
 Æschines, 193  
 de Afflictis, Matth., Utriusque Siciliae  
     etc. Constitutiones, 236  
 Albertus, *see* Brixensis  
 Alciatus, 20, 70  
     on Digest, 35, 42, 198  
     on Code, 69, 71  
     de Singulari Certamine, 59, 66  
     on Tacitus, 190  
     Emblemata, 23  
 Alexander, *see* Tartagni  
 Alexander ab Alexandro, Geniales Dies,  
     46, 152, 177, 208, 243, 244  
 Alfonso of Castile, Against Heresy, 17  
     Lawful Punishment of Heretics, 21  
 Alvarus, Pelagius, on Feudal Law, 236  
 Ambrose, St., 184  
     Epistles, 63  
     Offices, 65, 72  
 de Anania, Joh., on Canon Law, 46  
 de Ancharano, Petrus, 33  
     on Decretals, 23  
     Consultations, 61  
 Andreae, Joh., 49, 69  
 Angelus, *see* Aretinus  
 Appian, Civil War, 13, 29, 56, 64, 74,  
     82, 92, 113, 117, 119, 134, 160,  
     162, 166, 167, 184, 227  
     Punic War, 15, 40, 58, 108, 136, 172  
     Preface to Roman History, 19, 109  
     on Mithridates, 122  
     Parthian War, 226, 232  
     Spanish War, 65, 72, 174, 175, 225  
     Syrian War, 105, 162, 189  
 Apocrypha,\* *passim*  
 Aquinas, Thomas, 21, 32, 41  
 Aretinus (i. e. of Arezzo), Angelus, 49  
     on Codex, 23  
     on Digest, 23, 25  
     on Institutes, 24, 33  
 Aristotle, Politics, 41  
 Augustine, St., Kingdom of God, xi, xii,  
     8, 24, 33, 41, 56, 95, 103, 106, 108  
     Letter to Boniface, 8  
     Against Faustus the Manichæan, 9,  
     21, 103  
     Questions on Joshua, 11, 32, 33  
 Aurelius Victor, Sextus, 24  
 Authenticæ, *passim*  
 Baldus, on Code, 23; 33, 39, 197, 198,  
     204  
     on Digest, 24, 42, 46, 69  
     on Feudal Law, 24, 26, 61, 82, 236  
     on Canon Law, 62  
 Bartolus, on Code, 66, 204  
     on Digest, 12, 24, 37, 46, 48, 56, 61,  
     78  
     on Extravagans, 10  
     on Reprisals, 33  
 Bellovensis (i. e. of Beauvais), Vincent,  
     69  
 de Bellou, Jacob, on Novels, 33  
 Bellus, Petrinus, de Re Militari, 69, 70  
 de Bernard, Girard, Hist. France, 19  
 Bible, The Holy,\* *passim*  
 Bodin, on Republic, 9, 19, 43, 58, 61,  
     62, 63, 67, 77, 81, 83, 90, 103  
     on Historic Method, 20, 28, 35, 62,  
     80  
 Boerius, Decisions, 24, 42, 46  
     on Custody of the Keys, 24  
 Bonaud, Jacques, Additions to Terra  
     Rubea's Contra Rebelles suorum  
     Regum, 103  
 Brixensis (i. e. of Brescia), Albertus, 20  
     Repertory, 17  
     Roman Civil Procedure, 204  
     Consultations, 204  
 Budaëus (Budé), on Digest, 31  
     on Pollux, 33  
 de Butrio, Ant., on Canon Law, 62,  
     69

\* The translator estimates that there are 70 citations of the Bible and Apocrypha.

- Caesar, on Gallic War, 13, 24, 104, 115, 122, 139, 152, 154, 158, 176, 178, 184, 212  
 on Civil War, 79, 106, 113, 116, 118, 177, 192, 224  
 Cagnol, Hieron., 26, 28  
 on Digest, 29  
 de Canibus (degli Cani), Jac., Tractatus Represaliarum, 33  
 Canon Law,\* *passim*  
 Cantiancula, Claude, on Institutes, 42  
 Card. (i. e. Cardinal), *see* Turre Cremata  
 Cas, *see* Chassaneo  
 Cassiodorus, Tripartite Eccles. History, 21  
 de Castro, Paulus, 69  
 Cato, Marcus, de Re Militari, 209  
 Chassaneo, Bartol., 20  
 Customs of Burgundy, 24  
 Cicero, Republic, v, 41, 195  
 Offices, 4, 6, 7, 23, 34, 35, 43, 46, 56, 57, 58, 59, 65, 66, 68, 81, 86, 87, 95, 96, 100, 103, 113, 119, 130, 161, 191, 228, 236, 240  
 Laws, 6, 7, 15, 40, 60  
 Philippics, 8, 10, 12, 13, 36, 61, 64, 80, 90, 102, 111, 133, 135, 139, 142, 184, 206, 207  
 Academica, ix  
 Tusculan Disputations, 174, 197  
 Letters, 12, 32, 37, 64, 143, 162  
 Against Catiline, 13  
 Topica, 22, 44, 97  
 de Inventione, 40  
 Orator, 44  
 Nature of the Gods, 241  
 For Caecina, 44  
 To Herennius [*see* Cornificius]  
 Against Rullius, 60  
 For Cornelius Balbus, 71, 75, 77  
 Against Piso, 77  
 Against Vatinius, 102  
 For the Manilian Law, 111, 120, 122, 133  
 Paradoxa, 120  
 For Milo, 135  
 For Cluentius, 195  
 For Rabirius, 241  
 Cinna, 198  
 Cinus, *see* Cynus  
 Clarus, Julius, 103
- Coelius Rhodiginus (of Rovigo near Venice), Lælius, Lectiones Antiquæ, 155  
 Connanus, Francisc., 78  
 Corasius (Coras), 70  
 Miscellanea Juris Civilis, 120  
 Corneus, Pet. Phil., Consultations, 70  
 Cornificius, To Herennius, 15, 46, 102  
 de Covarruvias, 78  
 Relectiones, 20  
 on Canon Law, 21, 42, 47, 49, 56  
 Variæ Resolutiones, 32  
 Veterum Collatio Numismatum, 189  
 Councils, Proceedings of, at Constance, 17  
 at Trent, 26  
 Cremensis (Franciscus de Crema), Singularia, 178  
 Crinitus, Petr., de Honesta Disciplina, 92, 107, 203  
 de Cuneo, Gul., 23  
 Curtius, Quintus, History of Alexander, 95, 97, 121, 132, 161, 173, 174, 192, 219  
 Curtius, Rochus, on Canon Law, 178  
 Curtius (or Corte) Senior, 26  
 on Digest, 28  
 Curtius (or Corte) Junior, 26  
 Consultations, 10, 12, 28  
 Cynus, or Cinus, 61  
 on Codex, 23, 82, 198, 204  
 Cyprian, St., Questions, 16
- Decius, Philip, 26, 70  
 on Digest, 56, 197  
 on Code, 28, 204  
 Consultations, 69  
 Demosthenes, Against Leptines, 241  
 Dio Cassius, 65  
 Diodorus Siculus, 197, 210, 219  
 Dionysius of Halicarnassus, Roman Antiquities, 3, 4, 5, 11, 13, 17, 18, 23, 36, 42, 45, 62, 63, 66, 69, 73, 74, 75, 76, 78, 80, 82, 83, 89, 106, 111, 123, 131, 153, 154, 158, 166, 175, 184, 206, 229  
 Domin., *see* de Soto  
 Duarenus (François le Douaren), on Digest, 56, 78  
 Dumoulin, *see* Molinæus  
 Durand, Gul., Speculum Juris, 24, 61

\*The translator estimates that there are 206 direct citations of the Canon Law.

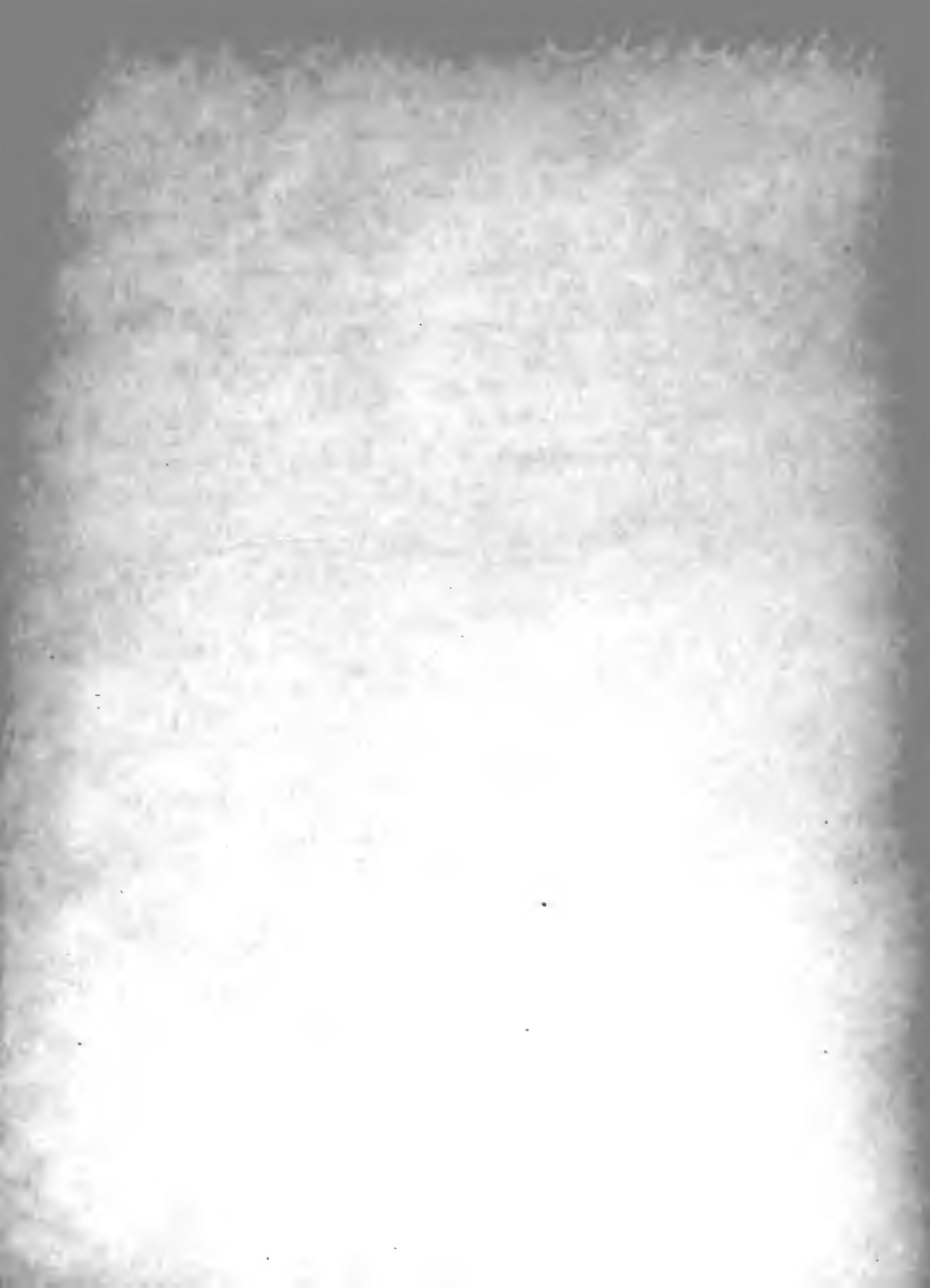
- Egnatius, Joh. Baptista, *De Exemplis Illustrium Virorum*, 236
- Ennius, v
- Epicrates (?), 110
- Euripides, 113, 242
- Eusebius, *Eccles. Hist.*, 22
- Faber, Joannes, on *Institutes*, 28
- Felinus (i. e. of Felino near Reggio), Sandei, 69  
on Canon Law, 17, 45, 57, 61, 62, 66, 178
- Ferrandus, Fulgentius (Diaconus), *Ad Reginum Comitem*, 46, 57
- Feudal Laws, 27, 78, 187, 199, 236
- Florus, *de Gestis Romanorum*, 4, 6, 87, 88, 92, 98, 203
- Fortunatus, Marcellus, on *Digest*, 45, 56
- Franciscus, *see* Victoria
- Froissart, *Chronicles*, 30
- Fulgosius (Fregoso), 20  
on *Digest*, 23
- Gellius, Aulus, *Noctes Atticae*, 5, 14, 55, 70, 79, 179, 202, 207, 208, 212, 244
- Gratianus, Hieron., *Consultations*, 236
- de Herrera y Tordesillas, Ant., *Spanish War*, 196  
Gallic War, 37
- Horace, *Odes*, vi
- Hornanus, Hadrianus Junius, *Nomenclator (?) Rei Numerariæ*, 189
- Hotman, Franco Gallia, 19
- de Imola, Joh., 70  
*Consultations*, 236
- Jason, Mainus, 61  
on *Digest*, 23, 49, 82, 198  
on *Institutes*, 33
- Justin, *History*, 84, 97, 100, 119, 123, 128, 142, 145, 146, 153, 158, 159, 163, 166, 219, 220, 229, 231
- Justinian,\* *Codex*, *passim*  
*Digest*, *passim*  
*Novels*, *passim*
- Justinian—Cont'd  
*Institutes*, 22, 28, 35, 40, 41, 42, 43, 44, 47, 48, 50, 52, 54, 59, 61
- Lactantius, 34
- Lampridius, Ælius, 36
- Laudensis (of Lodi), Martinus, 69  
on *Digest*, 49
- Livy,† *passim*
- Lombard Laws, 27
- Lucan, *Civil War*, 15, 145
- Macrobius, *Convivia Saturnalia*, 130
- Molinæus (Charles Dumoulin), *Custom of Paris*, 61, 78  
*Additions to Decius' Consultations*, 236
- Mysinger a Frundeck, Joach., *Centuriæ Observationum Camera- lium*, 69, 70
- Natta, *Consultations*, 23
- Nicephorus, 21, 22
- Nonius, Marcellus, 195
- Oldradus de Ponte, *Consultations*, 24
- Omphalius, Jacob, 61
- Orosius, Paul, 22, 106
- Ovid, 163  
*Metamorphoses*, 66, 112
- Panormitanus (i. e. of Palermo), Nich. de Tedeschis, 70  
on Canon Law, 23, 45, 57, 61, 62, 136, 202  
*Consultations*, 236
- Papae (or de la Pape), Guido, *Decisions*, 28  
*Questions*, 46, 63
- Paponius, Joh., *Arresta (arrêts, judgments)*, 33, 46, 54, 61, 63, 82
- Plato, *Republic*, 187, 239
- Pliny, the Elder, *History*, 180
- Pliny, the Younger, *Letters*, 80, 81, 185  
*Panegyric*, 81, 241
- Plutarch, *Apophthegms*, xii, 8, 23, 51, 84, 86, 96, 100, 106, 108, 109, 114, 117, 120, 121, 146, 160, 162, 166, 167, 214, 221, 231, 232, 234, 241  
*Roman Questions*, 5

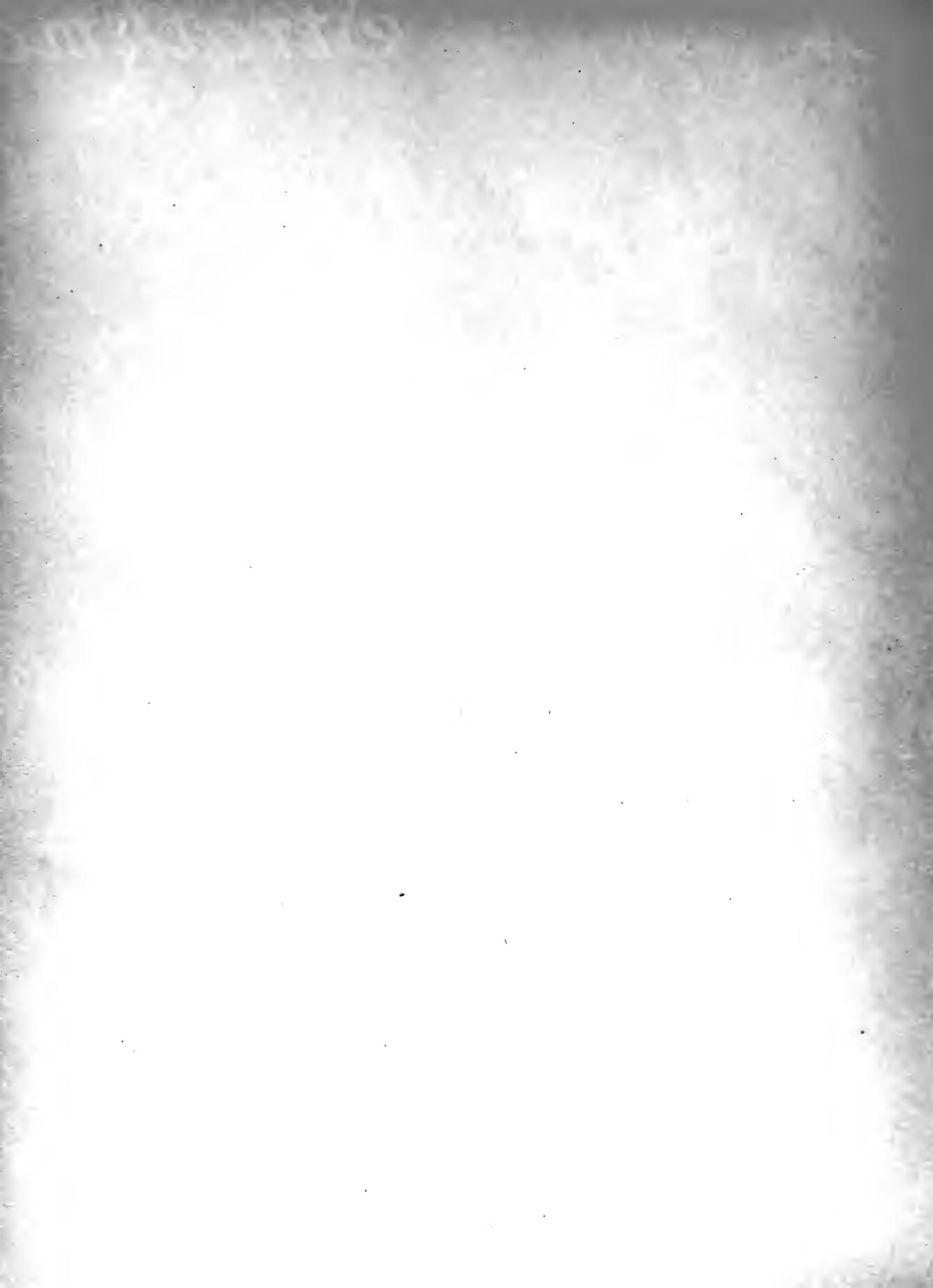
\* The translator estimates that there are 704 direct citations of the *Digest*, 228 of the *Code* and 15 of the *Novels* and *Authenticæ*.

† The translator estimates that there are about 140 citations of *Livy*.

- Plutarch—Cont'd  
 Lives, 9, 17, 24, 63, 66, 76, 96, 99,  
 121, 124, 126, 143, 146, 184, 187  
 on Fortune and Valor of Alexander,  
 84, 110  
 on the Virtues of Women, 92  
 on Education of a Prince, 96  
 on Preservation of Health, 162  
 Banquet of Seven Wise Men, 209  
 Lives of Ten Orators, 218  
 on God's Slow-Moving Vengeance,  
 218  
 Polybius, History, 206, 234  
 on Roman Camps, 182, 193, 207,  
 232, 239  
 Praepositi (Despaborde), Gul., 41  
 Procopius, History, 107  
 Pyrrhus, Englebermæus, 49
- Quintilian, 22  
 Declamations, 15  
 on the Soldier Marian, 171  
 Training of an Orator, 40
- de Rauen (Ravanus), on Canon Law,  
 204  
 Rhodiginus, *see* Coelius  
 Ripa, Joh. Francisc., on Digest, 49  
 Consultations, 75  
 Romanus, Ludovicus, on Digest, 24  
 de Rosate, Albericus, on Codex, 23
- Salicetus, on Codex, 33, 198, 204  
 on Digest, 49  
 Sallust, ix, 173  
 Conspiracy of Catiline, 103, 218  
 Jugurthine War, 233  
 Seneca, 118  
 Letters, 57  
 Hercules Oetæus, 65  
 de Beneficio, 81  
 de Silvestris, Vergilius, Responsa, 45,  
 57  
 de Soto, Dominicus, 20, 33, 45, 57  
 on Justice and Law, 17  
 Socinus, Bartolus, 69
- Socinus, Laelius Marianus, Consulta-  
 tions, 9, 69, 75  
 Sozomen, Eccles. Hist., 21  
 Spanish Ordinances,\* *passim*  
 Specul., i. e. Speculator, nickname of  
 Durand, *qu. v.*  
 Suetonius, 96, 111, 119, 182, 239, 240  
 Sylvest., *see* de Silvestris
- Tacitus, Annals, 64, 109, 159, 161, 174,  
 189, 206, 224, 227, 242  
 Tartagni, Alexander, 49, 70  
 on Digest, 23, 197, 198, 204  
 on Code, 69, 71  
 Consultations, 28  
 Thom. or Thomas, *see* Aquinas.  
 Tiraqueau, on the title de Judicio in  
 Rebus Exiguus Ferendis, 69  
 on Nobility, 219, 220  
 a Turre Cremata (Torquemada), Car-  
 dinal, 20, 32
- Valerius Maximus, vii, 10, 56, 58, 63,  
 67, 68, 72, 76, 80, 87, 88, 89, 92,  
 97, 102, 111, 115, 116, 123, 132,  
 134, 135, 136, 171, 172, 173, 181,  
 186, 196, 209, 212, 213, 218, 219,  
 223, 227, 228, 229, 230, 232, 242,  
 244  
 a Valle, Roland, Consultations, 66  
 Vasquez, Fernandus, Illustres Quaes-  
 tionibus, 19, 21, 24, 26, 28, 80  
 Vegetius, de Re Militari, 142, 171,  
 188, 191  
 Vergil, 84, 158  
 Verrutius, Hieron., de Verborum Sig-  
 nificatione, 208  
 de Victoria, Franciscus, 33  
 Vinc. or Vincent, *see* Bellovensis
- Xenophon, 84, 131  
 Cyropædia, 186, 220
- Zasius, Apologia contr. Eckium, &c., 56  
 on Digest, 23  
 Zoannettus, Francisc., de Imperio Ro-  
 mano, 62, 204

\*The translator estimates that there are 31 citations of this authority.









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